

Revocation of Tripartite Rolling Contracts: Finding a Remedy in the Twenty-First Century Usage of Trade

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A buyer's right to revoke acceptance of nonconforming goods under U.C.C. § 2-608 can be thought of as a universal lemon-law, hard-wired into the sales provisions of the Uniform Commercial Code. In consumer transactions, this provision can be an especially important means of leveling the playing field where, for example, a good's defect is difficult to ascertain at the point of sale. However, the pace of change in modern commerce has vastly outstripped the minor changes enacted by U.S. jurisdictions since Article 2's original conception in the 1940s. As a consequence, U.S. courts have struggled to decide cases under the current version of the Code involving a form of contracting referred to in this Note as "tripartite rolling contracts." In this form of sales contract, the manufacturer slips contract terms inside the product packaging that are applicable to the end-purchaser, and which are passed on by a disclaiming intermediary retailer. The problem for consumers is that not only are these hidden terms enforceable in most jurisdictions, but the consumer's right to revoke against the manufacturer is lost, under one construction of U.C.C. § 2-608, by virtue of the disclaiming intermediary who breaks the chain of privity.

The 2003 Amendments to Article 2 and other uniform codification efforts such as the Uniform Computer Information Transaction Act (UCITA) appear to ameliorate the problem by holding manufacturers accountable in tripartite rolling contracts. Alas, adoption is moving slowly for the new Article 2 and UCITA appears to be a lost cause in its present form. Recognizing the very real possibility that the currently enacted Article 2 may remain the law of the land in most jurisdictions for years to come, how can courts equitably decide cases while remaining true to the law enacted by state legislatures?

This Note pragmatically examines the dual axes of the consumer's dilemma, i.e., the enforceability of terms inside the product packaging and the bar to revocation against a remote manufacturer. Informed by a survey of the case law, equitable principles, and the practical necessities of the twenty-first century usage of trade, it is concluded that the more vulnerable axis is that of the bar to revocation. Therefore, a solution is put forth, consistent with a strong minority of U.S. jurisdictions, that construes the current version of U.C.C. § 2-608 to be available to consumers against remote manufacturers where manufacturers

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instigate tripartite rolling contracts by slipping terms inside of the packaging of the nonconforming goods they produce.

I. INTRODUCTION

The legal machinery for sales transactions on the books in nearly all U.S. jurisdictions, Article 2 of the Uniform Commercial Code, reflects the time period in which it was conceived. One can imagine a typical sales transaction in the 1940s, back when the Code was originally drafted,¹ as the kind of thing Norman Rockwell might have painted—for example, a soda-pop jerk with a big smile and a white hat ringing up a five-cent Cherry Coke for a freckled-faced teenager. This simple transaction involves two parties: a seller and a buyer. Hence, Article 2's provisions to this day are replete with references to the “buyer” and “seller” and

¹ Work started on Article 2 in 1942. Various drafts, some of which curiously (or optimistically) were labeled “final,” were debated and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) beginning in 1943 and by the American Law Institute (ALI) beginning in 1944. *See* THE AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. COMMERCIAL CODE: MAY 1949 DRAFT vii (1949) (listing the earlier dates of submission of each U.C.C. Article's original text). The recognized first “official” version of the U.C.C. was promulgated in 1951 and enacted in Pennsylvania in 1953, effective July 1, 1954. *See* UNIFORM COMMERCIAL CODE OFFICIAL TEXT WITH COMMENTS, General Comment Of National Conference Of Commissioners On Uniform State Laws And The American Law Institute (2004).

The 1951 version of Article 2 has been adopted in all U.S. jurisdictions, save Louisiana and Puerto Rico. While the state of Louisiana has resisted adoption of U.C.C. Article 2 in favor of its long enacted civil code sales provisions, it did adopt an updated civil code in 1993 that has many sales provisions inspired by Article 2. *See* Christian Paul Callens, Comment, *Louisiana Civil Law and The Uniform Commercial Code: Interpreting the New Louisiana U.C.C.-Inspired Sales Articles on Price*, 69 TUL. L. REV. 1649, 1651 (1995). However, the U.C.C.-invented concept of “revocation of acceptance,” which is the focus of this Note, is absent from the updated Louisiana Code. Rather, the traditional term “rescission” has been retained by Louisiana in describing a buyer's rights triggered by latent defects discovered after acceptance. *See* LA. CIV. CODE ANN. art. 2520 (West 1996) (“Warranty against redhibitory [hidden] defects”).

As other U.C.C. Articles have been revised over the years, minor conforming amendments have been made to Article 2, the last of which came with the 1999 revision of Article 9. This 1999 version is now the controlling law in all the U.S. jurisdictions, except of course, Louisiana and Puerto Rico. Unless otherwise specified, all references to U.C.C. Article 2 or its specific provisions pertain to this version of the code. Where specifically noted, especially in Parts III.C.2 and IV.C.1 *infra*, the newly promulgated 2003 Amendments to Article 2 are referenced. At the time of this writing, no jurisdiction has adopted the 2003 Amendments and only one state, Kansas, has even introduced legislation on the matter. *See* National Conference of Commissioners on Uniform State Laws, *Final Acts and Legislation*, Articles 2 and 2A (2003), Bill Tracking, at <http://www.nccusl.org/Update> (last visited Mar. 9, 2005).

have the general thrust of describing sales transactions in a perceived buyer/seller dichotomy.²

As commerce and the parties themselves have become more sophisticated, a model of mass merchandizing that involves three or more parties has developed in the usage of trade. Seller and buyer have become a false dichotomy. In its essential form, this model involves the following three parties: an end-purchaser, which may be a consumer; the entity from whom the consumer purchases the goods, for example a retailer; and thirdly, a manufacturer who warrants and/or makes various restrictions on the goods applicable to the end purchaser. Thus, following the distribution chain, the manufacturer sells goods to the retailer who in turn resells them to the buyer, creating privity of sales contract between the manufacturer and retailer, contract one, and between the retailer and buyer, contract two. A third agreement is offered by the manufacturer who encloses warranty or licensing terms inside of the product packaging. Upon accepting the terms of this third agreement, which may occur after the money and goods have changed hands, the buyer simultaneously consummates his relationship with both the manufacturer and retailer.³ Thus, the term "tripartite rolling contract" is used herein to refer to the delayed acceptance by the buyer in a transaction he undertakes simultaneously with multiple parties.⁴ Courts and commentators have applied a variety of labels on the manufacturer in this tripartite relationship, including "remote seller,"⁵ "third-party warrantor,"⁶ "remote manufacturer,"⁷ and "non-selling manufacturer."⁸

Faced with the challenge of deciding modern-day disputes involving this dispersed, tripartite relationship, courts have struggled in interpreting the currently

² The buyer/seller dichotomy is described in virtually every provision of Article 2 including the provisions governing formation (U.C.C. §§ 2-201-210 (1999)), the obligations of the parties (U.C.C. §§ 2-301-328 (1999)), title (U.C.C. §§ 2-401-403 (1999)), performance (U.C.C. §§ 2-501-515 (1999)), breach (U.C.C. §§ 2-601-616 (1999)), and remedies (U.C.C. §§ 2-701-725 (1999)).

³ See Harry M. Flechtner, *Enforcing Manufacturers' Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get a Refund?*, 50 RUTGERS L. REV. 397, 452-55 (1998). Professor Flechtner explains that the described warranty and sales contracts are formed simultaneously and are backed by a single consideration, the purchase price paid by the buyer. See *id.* at 455.

⁴ As discussed further in Part III *infra*, in a rolling contract the buyer's opportunity to reject both the warranty and sales contract is extended past the point in which consideration is given and the good received. See *ProCD v. Zeidenberg*, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (authorizing rolling contracts for software sales).

⁵ See Gary L. Monserud, *Blending the Law of Sales with the Common Law of Third Party Beneficiaries*, 39 DUQ. L. REV. 111, 177 (2000).

⁶ See Flechtner, *supra* note 3, at 453.

⁷ See *id.* at 405; see also *Gochey v. Bombardier Inc.*, 572 A.2d 921, 923 (Vt. 1990).

⁸ See *Kutzler v. Thor Indus.*, No. 03-C2389, 2003 U.S. Dist. LEXIS 11886, at *20 (N.D. Ill. July 11, 2003).

adopted version of Article 2, which was seemingly designed with the bipartite variety of contract in mind.⁹ The unhappy result for consumers in a majority of cases has been the limitation of one of consumers' most potent weapons, the right to revoke acceptance of goods under U.C.C. § 2-608. In examining the legal doctrines responsible for the formation of tripartite rolling contracts as well as the prohibitions on their revocation in some situations, it becomes apparent that consumers are effectively being struck by a "one-two punch" in a majority of jurisdictions.

The "left jab" of this combination punch was most notably thrown by Judge Easterbrook of the Seventh Circuit in the case of *ProCD v. Zeidenberg*.¹⁰ This case, discussed in greater detail, *infra*, approved the practice of manufacturers who slip contract terms inside the product packaging, thus binding the end purchaser to new terms after the money and goods have changed hands. In other words, *ProCD* allowed the formation of a tripartite rolling contract. The rub is that it matters not under *ProCD* if the consumer actually reads, understands, or means to be bound by these new terms—acceptance occurs however the terms say it occurs. For example, the terms may define acceptance as occurring by a consumer simply using the goods or even where he takes no action at all and allows a period of time to elapse.¹¹ Thus, consumers who are sold defective goods and who are not quick enough to get out of harm's way, may unwittingly trigger the defined mode of acceptance and then get bitten by serpentine warranty disclaimers and other limitations that are hidden in the tall grass of boilerplate contracts of adhesion.¹²

The majority construction of currently adopted U.C.C. § 2-608 completes the combination punch analogy by landing a "right hook" once consumers have unwittingly "agreed" to the post-sale terms made enforceable by *ProCD*. U.C.C. § 2-608 is interpreted by majority-view courts to prevent consumers who "accept" the terms of tripartite rolling contracts from exercising their power of revocation of acceptance against third-party manufacturers. This is true even where the manufacturer was the one who instigated the tripartite relationship to begin with, who induced the sale between the retailer and consumer through advertising its warranty, and who is the party actually responsible for the nonconformity in the goods.¹³

The basic unfairness of joint application of *ProCD*'s enduring doctrine and the majority construction of U.C.C. § 2-608 is highlighted with a hypothetical consumer transaction in Part II. The next section, Part III, explores the origins and

⁹ See *supra* note 2 and accompanying text.

¹⁰ 86 F.3d 1447, 1452–53 (7th Cir. 1996) (authorizing rolling contracts for software sales).

¹¹ See *id.* at 1452.

¹² See *infra* Part III.

¹³ See *infra* Part IV.

jurisdictional adoption of the Seventh Circuit approach to enforcing tripartite rolling contracts. Part IV analyzes competing interpretations of U.C.C. § 2-608 in jurisdictions that allow or prohibit revocation against remote manufacturers. Both Parts III and IV consider the impact of the 2003 Amendments to Article 2, which are currently being considered by the states for adoption, as well as the wildly unpopular Uniform Computer Information Transactions Act (UCITA). Both model rules comprehensively address tripartite rolling contracts and therefore are highly likely to shape future jurisprudence in this area, at least indirectly. The final substantive section, Part V, recommends an approach that preserves the twenty-first century usage of trade, namely the enforcement of tripartite rolling contracts, while providing an appropriate level of protection to consumers. Simply stated, where a tripartite rolling contract binds a remote purchaser it should be revocable against the one who offered it originally. As will be explained, the recommended approach provides a consistent application of the Uniform Commercial Code in both the formation and revocation of tripartite rolling contracts while also balancing the current inequity. As argued below, the recommended interpretation of § 2-608 has a sound basis in the currently adopted version of the code¹⁴—and has an even stronger basis in the 2003 Amendments to Article 2, should they be adopted in the future.

II. THE PROBLEM CREATED FOR CONSUMERS

The basic unfairness of joint-application of *ProCD* and majority U.C.C. § 2-608 is perhaps easiest to see in consumer transactions. We are all consumers and, as such, we are all too familiar with the chicanery that sometimes ensues when a product is defective.

A. Hypothetical Consumer Transaction

Joe Consumer visits his local Megagadgets store to purchase a hot new consumer item called the iBreak, manufactured by Banana Computer. The iBreak is a portable music player and comes packaged with computer software integral to the device's operation. A Megagadgets salesperson convinces Joe that the iBreak is a "truly fantastic piece of machinery" while carefully avoiding any express guarantees of the product's quality or fitness for a particular purpose. Joe asks the sales clerk the meaning of a prominently displayed message near the store's cash register which reads, "ALL GOODS ARE SOLD 'AS IS.' MEGAGADGETS MAKES NO WARRANTY, EXPRESS OR IMPLIED, INCLUDING THE

¹⁴ Unless otherwise specified, references to Article 2 or specific provisions of the U.C.C. in this Note pertain to the 1999 version, the last NCCUSL/ALI update preceding the 2003 Amendments. This version has been adopted in nearly all fifty states and the District of Columbia and is therefore presently the controlling law in nearly all U.S. jurisdictions. See *supra* note 1 and accompanying text.

WARRANTY OF MERCHANTABILITY.” The clerk shrugs his shoulders and points Joe to the product display advertising the manufacturer’s One-Year Limited Warranty. Although the One-Year Limited Warranty was also advertised in small print on the product packaging, the warranty terms are not provided. The advertisement also does not mention any warranty disclaimers or restrictions on the product’s use. Joe figures that the One-Year Limited Warranty will probably be sufficient and, not knowing what “merchantability” means anyway, he is frankly relieved not to have to worry about it.¹⁵ Joe proceeds to the check-out line, iBreak in-hand, pays the cashier the sum required, and walks out of the store with the product.¹⁶

Upon arriving home, Joe, a self-described Luddite, enlists the help of his ten-year old wiz kid, Bailey, to get his new electronic gizmo up and running. Bailey tears open the product packaging and begins to connect the iBreak’s various wires and other parts. After hooking the iBreak up to Joe’s computer, Bailey inserts the software installation CD and begins the installation procedure. While Bailey is installing the software Joe notices that an “I agree” screen appears momentarily on his computer monitor. Bailey quickly clicks “OK” and explains that this is just a bunch of legal stuff and you have to click “OK” for the product to work. Scanning a paper copy of the One- Year Warranty Agreement that came inside the iBreak’s box, Joe realizes that if he really wanted to know what the warranty meant he would have to hire a lawyer that would probably cost more than the product was worth. Uncomfortable, but feeling that there really was not another option, Joe decides not to worry about the warranty. Besides, what could go wrong?

Unfortunately for Joe, this question would soon be answered. Although the iBreak functioned very well at first, after a few days its entire memory erased, requiring Bailey to reload all of Joe’s music onto the device. When this happened a second time, Joe took the product into an authorized Banana Computer service

¹⁵ The implied warranty of merchantability means that goods must be fit for their ordinary purpose. See U.C.C. § 2-314 (1999). To be disclaimed a seller must specifically use the word “merchantability” or mark the goods “As Is.” *Id.* Recognizing that most consumers do not understand the meaning of the legal term “merchantability,” the 2003 Amendments to Article 2 now require more transparent language for disclaimer in consumer transactions. To disclaim the implied warranty of merchantability under the 2003 Amendments, the seller must state the following: “The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract.” See U.C.C. § 2-314 (amended 2003).

¹⁶ The point at which a buyer exchanges money and receives a good in return is the traditional completion of the offer and acceptance process in a consumer sales transaction. As Judge Easterbrook concedes in *ProCD*, “placing the package of software on the shelf is an ‘offer,’ which the customer ‘accepts’ by paying the asking price and leaving the store with the goods.” *ProCD*, 86 F.3d at 1450 (after conceding the traditional mode of formation proceeding to explain the delayed formation involved in a rolling contract).

repair dealer to have it fixed. The repair shop kept the iBreak for six weeks and successfully solved the problem. The day after Joe got the iBreak home one of its buttons popped off. Joe dutifully returned the iBreak to the repair shop, which once again fixed the problem, holding it for a mere three weeks this time. After two more similar problems and consequent loss of the product's use, Joe decided he had had enough.¹⁷

Joe's first step was to package the product up and try to return it to the Megagadget's store in which it had been purchased. The store manager explained to Joe that the terms spelled out on the sign near the cash register that disclaimed all warranties including the implied warranty of merchantability meant that Joe must deal with the manufacturer directly for any sort of refund.¹⁸ The manager further explained to Joe that it was store policy not to accept returned goods in which the packaging had been opened. This was especially true for products that had been purchased on a date more than thirty days before.¹⁹

¹⁷ The problems represented in the hypothetical are entirely fictitious. No implication is meant in regard to the performance of any actual product or the willingness of any manufacturer to make repairs.

¹⁸ "Retailers . . . commonly avoid making express warranties and disclaim implied warranties, leaving only the manufacturer's warranty applicable in many transactions. Moreover, even if a retailer is subject to a warranty of merchantability, the resulting scope of liability is narrower than under a typical manufacturer warranty against all defects." Martin B. White, *Retail Sellers and the Enforcement of Manufacturer Warranties: An Application of the Uniform Commercial Code to Consumer Product Distribution Systems*, 32 WAYNE L. REV. 1049, 1054 (1986). The rationale for holding disclaiming sellers harmless is a strong one. As explained by one Florida Appellate Court:

Where a dealer has properly disclaimed all warranties, the delivering, presenting, or explaining of a manufacturer's warranty, without more, does not render the dealer a co-warrantor by adoption . . . nor does it create a contractual obligation which can serve as a basis for a buyer's later revocation of acceptance. Should we hold otherwise, an automobile dealer would effectively be precluded from disclaiming responsibility for the warranties of the manufacturer, despite the fact that [the Florida equivalent of U.C.C. § 2-316] authorizes a dealer to do so.

Frank Griffin Volkswagen v. Smith, 610 So. 2d 597, 599 (Fl. Ct. App. 1992) (internal citations omitted); see also *infra* notes 137–38 and accompanying text; compare *infra* note 136 and accompanying text (noting that such disclaimer is effective only after the time for rejection has passed).

¹⁹ Having properly disclaimed all warranties, including the implied warranty of merchantability, Megagadgets has no liability if the goods are defective. In keeping the product for a period of many weeks he has arguably failed to make his rejection within a reasonable time pursuant to U.C.C. § 2-602(1) (1999). Since Joe's reasonable opportunity to inspect has expired, he has therefore accepted the goods by default under § 2-606(1)(b) (1999). The effect of acceptance is that a buyer may no longer reject the goods. See U.C.C. § 2-607(2) (1999).

Joe next wrote Banana Computer a letter, letting them know that he was fed up with the product and wanted nothing more to do with it. He stated in his letter that while the iBreak worked great for a few days at a time, the constant problems had made him lose faith in its reliability. Furthermore, it just is not worth very much to him if he can only use it a few days out of every month due to the lengthy repair service. He tactfully proposed to mail back the iBreak if Banana Computer would agree to refund his purchase price and cost of shipping. Otherwise, he warned, legal action would be his next step.

Banana responded with a letter of its own. The letter explained that because Joe had clicked the "I agree" button during installation of the iBreak software, he was bound by the terms of his warranty agreement.²⁰ The letter explained that Banana would gladly continue to honor the sole means of remedy he had agreed to, which was to repair or replace the product, at Banana's option, for up to one year. The letter further stated that Banana was under no obligation to offer him a refund.²¹ Finally, the letter advised that if Joe should decide to go to the trouble and expense of hiring a lawyer, he should know that Banana has an army of very good lawyers of its own and has a policy of aggressively defending all breach of warranty actions. He was further put on notice that should he elect to go forward with legal action, "Clause Ten" of the warranty agreement restricts him to arbitration. Therefore, any suit he may attempt to file in state or federal court would be tossed out.

B. *Why Consumers Do Not Read*

Most scholars agree that consumers like Joe in our hypothetical do not read contracts of adhesion, in general, nor are they anymore likely to read them in shrinkwrap agreements.²² Much has already been said to explain this

²⁰ For the sake of this hypothetical, Banana knows that Joe clicked the "I agree" button for two reasons. First, his product would not have functioned at all had the installation process not been completed. Second, Joe's computer automatically registered his warranty agreement with Banana over the Internet when he clicked the button.

²¹ On the facts of this hypothetical, such a request for refund made after the time for rejection has passed amounts to the legally defined action of "revocation of acceptance." Court's in Joe's jurisdiction do not allow revocation against a manufacturer who does not sell the product directly to a consumer. See *infra* Part III.C.1. While the Magnuson-Moss Act provides consumers the right to a refund for excessive repairs of a consumer good, the Act applies only to "Full Warranties," not the "Limited Warranty" at issue in the hypothetical. See Flechtner, *supra* note 3, at 412-13 & n.36 (citing 15 U.S.C. § 2303(a)(2) (1995)).

²² Robert A. Hillman, *A Tribute to Professor Joseph M. Perillo: Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 743 (2002) (referring to "the widely accepted fact that, for a number of reasons, consumers typically do not read their standard forms."); see also *id.* at 747 n.18 ("Virtually every scholar who has written about contracts of adhesion has accepted the truth [that consumers do not read their forms], and the few empirical studies

phenomenon and little more can be added here that will be of further use. To provide the reader with a framework for understanding the plight of consumers like Joe in the hypothetical, this section will simply provide two fairly comprehensive summaries others have put forth explaining why consumers do not read.

Robert A. Hillman summarizes some of the reasons that consumers do not read boilerplate contracts of adhesion in the passage below:

The seller is familiar with the form, having spent lots of time and money using and rewriting it. On the other hand, the consumer is not very interested in the seller's form. Typically the consumer does not have much time to study the form, nor the resources to shop for terms, a search that would usually prove fruitless anyway. In addition, the consumer could not understand most of the language even if she did read the form. The consumer also believes correctly that the seller's agent is not going to bargain over the boilerplate. Moreover, the consumer assumes nothing will go wrong with the product but, should it be defective, the seller will remedy the problem. Finally, the consumer expects the law to protect her from egregious terms. In short, the seller presents a form largely incomprehensible to the consumer on a take-it-or-leave-it basis, and the consumer has good reason not to read the form.²³

Clayton P. Gillette provides concurring analysis of the non-reading buyer phenomenon in his article, *Rolling Contracts as an Agency Problem*. As the excerpted passage below indicates, Gillette argues that a buyer's decision not to read standard form contracts may be a perfectly rational decision:

Some recent literature attributes failure to read terms to cognitive heuristics that either cause buyers to misestimate risks or otherwise prevent buyers from assessing terms with comprehensive rationality. But failure to read may be perfectly rational, especially given the inability to negotiate around terms, if the buyer accurately predicts that the costs of review exceed its benefits. Even a rational buyer who anticipates that a proposed contract does not fully internalize purchaser interests, for instance, could fail to review terms if the buyer predicted that transactional breakdowns to which disfavored terms apply are unlikely to occur, especially where the buyer relies on branding or other reputational signals to ensure quality. Similarly, rational buyers could forgo review if they believed that disfavored terms cannot be negotiated. In that case, the buyer would be faced with a take-it-or-leave-it proposition and would exercise the former option unless

that have been done have agreed. My survey reinforces the empirical work. Only 24 out of 100 respondents (24%) indicated that they read the terms of rolling contracts.”) (internal citation omitted); Clayton P. Gillette, *Rolling Contracts As An Agency Problem*, 2004 WIS. L. REV. 679, 680 (2004) (“[C]ommentators agree that buyers, or the vast majority of them, do not read the terms presented to them by sellers.”).

²³ Hillman, *supra* note 22, at 746–47.

the terms were expected to be both onerous and likely to be applied. Rational buyers might also believe that sellers are likely to waive the disfavored term in the event of a transactional breakdown, in which case there is little cause to review them in advance. Finally, rational buyers who believe that courts will refuse to enforce terms that are exploitive have little reason to consider those terms *ex ante*.²⁴

Given the force of the arguments above, together with the wide agreement that consumers simply do not read boilerplate,²⁵ little ground can be gained by arguing, from an equitable standpoint, that consumers deserve whatever they get by not reading. If, as Judge Easterbrook contends, “[c]ompetent adults are bound by [their acceptance of] such documents, read or unread”²⁶ then consumers at least should be afforded every opportunity to revoke their acceptance when the conditions of U.C.C. § 2-608 are met. However, this option is not available to consumers in some jurisdictions when the tripartite rolling contract device has been employed by the manufacturer.²⁷ The following section describes in detail how tripartite rolling contracts are structured and how they came to be and provides inescapable evidence indicating that rolling contracts appear to have become a fixture in the modern usage of trade. First, though, the following section, Part III, will describe the origin and expansion of rolling contract doctrine within the Seventh Circuit. Part III also analyzes the jurisdictional adoption of the Seventh Circuit’s approach nationally, demonstrating that at a minimum, it must be agreed that Judge Easterbrook’s decision in *ProCD* has become intractably interwoven into the jurisprudence of twenty-first century sales disputes.

III. TRIPARTITE ROLLING CONTRACTS

Judge Easterbrook’s decision in *ProCD v. Zeidenberg*²⁸ held that a software manufacturer may enforce contract terms against an end-purchaser where these terms are bundled inside the shrink-wrapped package of goods and are unread prior to the exchange of money and goods. It is important to note at the outset that, while the case itself has become famous and generated voluminous legal commentary, it is most correctly viewed as supporting the *status quo* rather than mandating a radical departure from it. With *ProCD*, Easterbrook merely put his imprimatur on the already well established usage of trade in the software industry.²⁹

²⁴ Gillette, *supra* note 22, at 680.

²⁵ See *supra* note 22.

²⁶ Hill v. Gateway 2000, 105 F.3d 1147, 1149 (7th Cir. 1997).

²⁷ See *infra* Part IV for a discussion of this topic.

²⁸ 86 F.3d 1447, 1452–53 (7th Cir. 1996).

²⁹ “Shrinkwrap licenses have been a fixture in computer software transactions for some time. Exactly who first used a shrinkwrap license provision in a software

Before going any further, a word on terminology is in order. In *ProCD*, Judge Easterbrook colloquially referred to the agreement formed as being a “shrinkwrap license.”³⁰ Cyberspace equivalents to such shrinkwrap agreements have cropped up with the increasing popularity of sales over the Internet in the time since *ProCD*. These agreements are known variously as “click-wrap,” where a buyer assents to terms by clicking a button in the software interface, “browse-wrap,” where buyer’s assent is found simply by loading an HTML page in a browser; and a variety of other labels, which invariably end in the word “wrap” and are descriptive of other means of post-sale authentication including email, E-sign, and biometric authentication.³¹ For the sake of convenience, the term “shrinkwrap agreement” will be used herein to apply to all such equivalent means of assent, affirmative or otherwise. Shrinkwrap (and cyber equivalents thereof) agreements have also been labeled “rolling contracts” because their terms are agreed to by the buyer after the money and goods have changed hands.³² A particular species of the rolling contract genus, identified herein as “tripartite rolling contract,” describes the relationship formed among the producers, sellers, and buyers of goods in the twenty-first century usage of trade. In a tripartite rolling contract, the manufacturer and end-purchaser are not in privity of sales contract but depend on at least one intermediary in the chain of distribution, such as a retailer, to pass along the shrinkwrapped terms of their deal.³³ It is this tripartite variety of rolling

transaction is a fact lost in the arcane mists of computer history. Certainly, they were a feature of the licensing landscape by the early 1980s.” Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 & n.5 (1995).

³⁰ As Judge Easterbrook explains in *ProCD*:

The “shrinkwrap license” gets its name from the fact that retail software packages are covered in plastic or cellophane “shrinkwrap,” and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer “end user license,” but we use the more common term.

Id. at 1449.

³¹ See Michael Dessent, *Browse-Wraps, Click-Wraps and Cyberlaw: Our Shrinking (Wrap) World*, 25 T. JEFFERSON L. REV. 1, 6–8 (2002).

³² See, e.g., Hillman, *supra* note 22, at 744.

³³ This Note focuses on the rights and obligations of the party at the beginning and end of the chain of distribution, the manufacturer and end purchaser respectively. Obviously, more than one “middle-man” between the manufacturer and end purchaser could and do exist in modern commerce. However, for the topics discussed herein, no conceptual difference exists between the three-party chain and a more complicated model involving more than one intervening party. What is meant to be distinguished by the term “tripartite rolling contract,” and therefore not addressed herein, is a shrinkwrap agreement formed as part of a direct sales transaction between the manufacturer and end-purchaser.

contract that was at issue in *ProCD* and which will be the focus the remainder of this Note.

A. "Let's Roll": *ProCD v. Zeidenberg* and *Rolling Contracts*

The controversy in *ProCD* arose from defendant Matthew Zeidenberg's retail purchase and subsequent commercial use of a consumer software product named SelectPhone®.³⁴ The manufacturer of this product, plaintiff ProCD, Inc., prohibited the sharing of the software's information to other parties through use of a "shrinkwrap license,"³⁵ notice of which was provided on the outside of the box.³⁶ After triggering the mode of acceptance specified in the license,³⁷ Zeidenberg violated the single use restriction by reselling the data over the Internet.³⁸ The central issue in the case was whether or not shrinkwrap licenses are enforceable.³⁹

The district court analyzed the two leading cases on the enforceability of shrinkwrap licenses, *Step-Saver Data Systems*⁴⁰ and *Arizona Retail Systems*,⁴¹

The recently promulgated 2003 Amendments to Article 2 warranty provisions, section 2-313 and new sections 2-313(A) and (B), for the first time codify the tripartite rolling contract relationship in Article 2. *See infra* Part III.C; *see also infra* Part III.B (codification of tripartite rolling contracts in UCITA). The conceptual framework for a collection of related but legally distinct sales and warranty transactions also finds support in Professor Harry M. Flechtner's article, *supra* note 3, at 452–55.

³⁴ *ProCD*, 86 F.3d at 1450.

³⁵ The restriction was worded as follows, "[y]ou will not make the Software or the Listings in whole or in part available to any other user in any networked or time-shared environment, or transfer the Listings in whole or in part to any computer other than the computer used to access the Listings." *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 645 (W.D. Wis. 1996).

³⁶ *See ProCD*, 86 F.3d at 1449. The full terms of this license agreement in *ProCD* were not printed on the outside of the product's box, although the box did indicate that restrictions on use were included inside. *See ProCD*, 908 F. Supp. at 645. The full terms of the license agreement were provided in the printed "User Guide" included inside the product's packaging. *Id.* at 644. Additionally, notices and warnings related to the use restrictions appeared on Zeidenberg's computer screen when the software was installed and when the software application was run. *Id.* at 645.

³⁷ The shrinkwrap agreement specified the buyer's mode of acceptance—"using the software or accessing the listings contained on the discs," as well as the buyer's mode of rejection—"promptly return all copies of the software, listings . . . , discs, and User Guide to the place where you [the buyer] obtained it." *Id.* at 644. Zeidenberg triggered acceptance by using the software to download data from the Select Phone® discs to his own database. *See id.* at 645.

³⁸ *See id.* at 645.

³⁹ *ProCD*, 86 F.3d at 1448.

⁴⁰ *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 91 (3d Cir. 1991).

and reached the same result these cases had reached: the shrinkwrap license was unenforceable.⁴² The district court concluded that the shrinkwrap terms were not included with the offer for sale and therefore represent either a proposed modification under U.C.C. § 2-209,⁴³ as *Arizona Retail Systems* had found, or was a proposed addition under U.C.C. § 2-207,⁴⁴ as the *Step-Saver* court had decided.⁴⁵ Since the district court found that these new terms were not assented to by the purchaser, it found that the terms were unenforceable regardless of which section of the U.C.C. is applied.⁴⁶

On appeal to the Seventh Circuit, Judge Easterbrook overruled the district court and stated unequivocally, "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)."⁴⁷ Judge Easterbrook swept the analysis of the prior cases aside, reasoning that *Step-Saver's* § 2-207 analysis was "irrelevant" because the instant case was not a "battle-of-the-forms" situation,⁴⁸ and that *Arizona's* holding under § 2-209 was not persuasive because that court had not reached the question.⁴⁹

Easterbrook grounded his analysis instead on basic rules of contract formation under U.C.C. § 2-204 and the definitions of acceptance and rejection of goods under U.C.C. §§ 2-606 and 2-602 respectively.⁵⁰ He reasoned that since a vendor, as master of the offer, may invite acceptance in the manner of his choosing, ProCD's choice to invite acceptance through use of the software was

⁴¹ *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 759 (D. Ariz. 1993).

⁴² *ProCD*, 908 F. Supp at 652, 655.

⁴³ U.C.C. § 2-209 (1999) ("Modification, Rescission and Waiver").

⁴⁴ U.C.C. § 2-207 (1999) ("Additional Terms in Acceptance or Confirmation").

⁴⁵ *ProCD*, 908 F. Supp. at 655.

⁴⁶ *Id.*

⁴⁷ *ProCD*, 86 F.3d at 1449.

⁴⁸ *Id.* at 1452 ("Step-Saver is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails Our case has only one form; U.C.C. § 2-207 is irrelevant."). Several commentators have argued that Easterbrook was wrong in stating that § 2-207 only applies to "battle of the forms" situations. See, e.g., Hillman, *supra* note 22, at 753 ("Easterbrook was plainly wrong about section 2-207's applicability. Nothing in the text of the section limits it to transactions involving more than one form.") (footnote omitted); Kristin Johnson Hazelwood, *Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers*, 55 WASH. & LEE L. REV. 1287, 1320-23 (1998).

⁴⁹ *ProCD*, 86 F.3d at 1452 ("*Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.").

⁵⁰ *Id.* at 1452-53.

valid under U.C.C. § 2-204.⁵¹ Since Zeidenberg had an opportunity to inspect the goods and failed to make an effective rejection under § 2-602(1), he accepted the goods by default under the rule of § 2-606(1)(b).⁵²

Among his supporting rationales, Judge Easterbrook suggested it would be futile to force product manufacturers to print entire contract terms in “microscopic type” on the outside of product packaging.⁵³ He further argued that “[c]ompetition among venders, not judicial revision of a package’s contents is how consumers are protected in a market economy.”⁵⁴ Besides, Easterbrook pointed out, “[t]ransactions in which the exchange of money precedes the communication of detailed terms are common.”⁵⁵ Some anecdotal examples provided by Easterbrook of “money now, terms later” transactions include the following sales: insurance contracts, airline tickets, concert tickets, prescription drugs, and most relevantly, online sales in the software industry.⁵⁶

B. “Rolling Down Hill”: Seventh Circuit Expansion of the ProCD Doctrine

Six months after deciding the *ProCD* opinion, Judge Easterbrook heard arguments in another dispute over the enforceability of shrinkwrap terms, *Hill v. Gateway 2000*.⁵⁷ Though the Hills ordered their product, a Gateway computer, directly from the manufacturer, and thus no tripartite relationship was created, the *Hill* case is useful for our present discussion because of Judge Easterbrook’s explicit comment on the scope of his earlier *ProCD* opinion.

At issue in the *Hill* case was the enforceability of an arbitration clause included inside of the product packaging. The terms of that shrinkwrap agreement stated that the customer agrees to be bound unless he returned the computer within 30 days.⁵⁸ After 30 days had passed, the Hills filed suit in federal court, where a sympathetic federal judge refused to enforce the arbitration clause.⁵⁹

⁵¹ *Id.* at 1452.

⁵² *Id.* at 1452–53.

⁵³ *See id.* at 1451.

⁵⁴ *Id.* at 1453.

⁵⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

⁵⁶ *Id.* It is worth noting that Easterbrook apparently took judicial notice of nearly all of his examples. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585 (1991), one of the few cases Easterbrook does rely upon, has subsequently been superseded by Congress. *See* 46 U.S.C. APP. § 183c(a) (2000) (declaring it unlawful for a passenger vessel to insert a forum selection clause on a consumer ticket); *see also* *Yang v. M/V Minas Leo*, No. 94-15168, 1996 U.S. App. LEXIS 2235, at *4 (9th Cir. Jan. 26, 1996).

⁵⁷ 105 F.3d 1147, 1147 (7th Cir. 1997).

⁵⁸ *Id.* at 1148.

⁵⁹ *Id.*

Hence, on Gateway's appeal to the Seventh Circuit, the Hills were in the difficult position of arguing before Judge Easterbrook that his prior decision in *ProCD v. Zeidenberg* should be limited to its facts and that the unread shrinkwrapped arbitration clause at issue should not be enforced.⁶⁰ Perhaps not surprisingly, the outcome of *Hill* had the adverse effect of expanding rather than limiting the scope of the *ProCD* doctrine of enforcing shrinkwrapped agreements.

The Hills made several attempts to limit the holding of *ProCD*, all of which were rejected by the Seventh Circuit. The Hills first attempted to limit *ProCD* to sales of software only. Easterbrook's retort: "where's the sense in that?"⁶¹ Judge Easterbrook explained that "*ProCD* is about the law of contract, not the law of software."⁶² He went on to recite the same non-software related instances of "money now, terms later" agreements he had provided in *ProCD*⁶³ and again rationalized that "[p]ractical considerations" such as the awkwardness of oral or written notification of the full terms of the agreement prior to shipment "support allowing vendors to enclose the full legal terms with their products."⁶⁴ Indeed, Judge Easterbrook argued, "[c]onsumers as a group are better off when vendors skip [such] costly and ineffectual steps"⁶⁵

In their second attempt to limit *ProCD*'s holding, the Hills argued that *ProCD* should be limited to executory contracts such as the license agreement disputed in *ProCD*.⁶⁶ Judge Easterbrook responded that this argument was legally wrong because the issue was one of formation not one of performance and that *ProCD*'s holding did not depend on whether the agreement is characterized as a sale or a license.⁶⁷

Next the Hills argued that the defendant in *ProCD*, Matthew Zeidenberg, was a merchant and that the *ProCD* doctrine should not be extended to consumer transactions such as the purchase in which the Hills engaged.⁶⁸ The Hills premised the distinction between merchant and consumer on their reading of U.C.C. § 2-207, the very section Judge Easterbrook had ruled "irrelevant" in *ProCD*.⁶⁹ Judge Easterbrook clarified that *ProCD* reaches "merchants and

⁶⁰ *Id.* at 1148-49.

⁶¹ *Id.* at 1149.

⁶² *Id.*

⁶³ See *Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997). ("Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors.").

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1150.

⁶⁹ U.C.C. § 2-207 (1999). Had U.C.C. § 2-207 been applied in *Hill*, then the *ProCD* case could have been distinguished in the following manner. U.C.C. § 2-207(2) provides

consumers alike,” and reiterated that “a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money . . . but after the consumer has had a chance to inspect both the item and the terms.”⁷⁰

A final unsuccessful attempt by the Hills to distinguish *ProCD*, which again resulted adversely in an extension of *ProCD*’s holding, was a factual distinction in the notice provided to the buyers in the two cases. The box in *ProCD* gave notice of an enclosed agreement, the Gateway box did not.⁷¹ Calling this difference “functional, not legal,” Judge Easterbrook found that the Hills “knew . . . that the carton would include *some* important terms” because of Gateway’s advertisements.⁷² Had they elected to do so the Hills could have discovered the details of these terms before ordering the computer either by requesting the vendor to send them a copy as required by the Magnuson-Moss Act⁷³ or by consulting public sources such as magazines and websites.⁷⁴ Having chosen not to avail themselves of either of these options, Judge Easterbrook reasoned, the Hills were still afforded a final method by which they could evaluate the terms of the agreement: “inspect the documents after the product’s delivery” and presumably return the goods if the terms were objectionable.⁷⁵

Under the Seventh Circuit’s approach it appears to matter not whether the mode of acceptance was triggered intentionally by the buyer. Such a requirement of intentionality would presume that the buyer actually read the contract and understood the significance of acting in such a way so as to trigger the mode of acceptance. However, the *Hill* opinion explicitly rejects any duty to read in the formation of shrinkwrapped agreements.⁷⁶ While this position has obvious practical appeal in lowering transaction costs, it is difficult to reconcile with the usual requirement that contract formation requires a “meeting of minds.”⁷⁷ For

that “additional terms are to be construed as proposals for addition.” In a consumer transaction U.C.C. § 2-207(3) applies, restricting the terms of the agreement to “those terms on which the writings of the parties agree” together with terms supplied by the gap-filling provisions of the U.C.C. where the parties’ writings do not agree. However, Easterbrook was in no mood to revisit the logic of his earlier holding. He reiterates in *Hill* that, “when there is only one form, ‘§ 2-207 is irrelevant.’” See *Hill*, 105 F.3d at 1150.

⁷⁰ *Hill*, 105 F.3d. at 1150.

⁷¹ See *id.* at 1150.

⁷² See *id.* at 1150.

⁷³ 15 U.S.C. § 2302(b)(1)(A) (2000).

⁷⁴ *Hill*, 105 F.3d at 1150.

⁷⁵ See *id.* at 1150.

⁷⁶ See *id.* at 1149 (“Competent adults are bound by such [approve-or-return] documents, read or unread.”).

⁷⁷ “One of the essential elements for the formation of a contract, other than a contract implied in law or quasi contract, is a manifestation of assent by the parties to the

example, even in “battle of the forms” situations, terms of a form contract not agreed to by the parties are excised from the agreement and replaced with filler terms elsewhere stated in the U.C.C.⁷⁸ Thus, the Seventh Circuit’s approach in *Hill* represents a remarkable departure from the touchtone of mutual agreement in the enforcement of specific written provisions.

It is also worth noting that, unlike the buyer in *ProCD*, the Hills’ lack of action, rather than any affirmative step on their part, triggered the acceptance clause of the agreement. In this case Judge Easterbrook held, “[b]y keeping the computer beyond 30 days, the Hills accepted Gateway’s offer, including the arbitration clause.”⁷⁹ Thus after *Hill*, non-action can trigger acceptance in the same manner that action can.

Hence, the *Hill* case clarifies and extends the *ProCD* doctrine to enforce shrinkwrap agreements, and therefore tripartite rolling contracts, in the following cases: (1) sales of all goods, whether software or some other product; (2) all shrinkwrap contract terms, whether they be executory or non-executory; (3) sales involving transactions with consumers in addition to those involving only merchants; (4) sales where specific written terms are included in the contract regardless of actual notice or evidence of the intent of the parties to agree to these terms; and (5) sales where formation is triggered by either non-action or some affirmative step.

C. “Roll With It Baby”: Rolling Contracts Are Here to Stay

1. Jurisdictional Adoption Evidences the Traction of the Seventh Circuit’s Approach Under Currently Enacted Article 2

Generally speaking, the enforcement of rolling contracts such as those upheld in *ProCD* and *Hill* continues to be the law in the Seventh Circuit⁸⁰ and has been

terms thereof. It is essential that both parties assent to the same thing in the same sense and that their minds meet on the essential terms and conditions.” *Interstate Industries, Inc. v. Barclay Indus., Inc.*, 540 F.2d 868, 871 (7th Cir. 1976) (quoting 1 WILLISTON SALES § 7-2 (4th ed. 1973)).

⁷⁸ See U.C.C. § 2-207(3) (1999); see, e.g., *Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 445 (3d Cir. 2003). As discussed previously, Easterbrook expressly rejects the applicability of U.C.C. § 2-707 to shrinkwrapped agreements. See *supra* note 47 and accompanying text.

⁷⁹ *Id.* at 1150.

⁸⁰ The Seventh Circuit appears to be confident in its decision and courts here consistently upheld *ProCD* and *Hill*, discussed at length in Parts III. A and B respectively. See, e.g., *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv.*, 236 F. Supp. 2d 907, 911 (N.D. Ill. 2002) (follows *Hill* and *ProCD* without comment and enforces a shrink-wrapped limitation of liability clause); *Kaczmarek v. Microsoft Corp.*,

adopted by a majority of jurisdictions to consider the issue. As discussed in more detail below, courts within the jurisdiction of seven other federal circuit courts of appeal appear to favor the Seventh Circuit approach in whole or in part. Of these adopting jurisdictions, courts within the First and Second Circuit are the strongest supporters. The Sixth, Eighth, and Eleventh Circuits as a group are generally supportive but have fewer cases on point. The Third Circuit adopts the Seventh Circuit approach with the reservation that actual assent to shrink-wrapped provisions be proven, as opposed to mere constructive assent through use, as found in *ProCD*,⁸¹ or constructive assent through inaction, as found in *Hill*.⁸² The final group of jurisdictions that can be said to generally adopt the Seventh Circuit approach are courts within the Ninth Circuit. As will be discussed, however, courts located within the Ninth Circuit are far from uniform in their handling of the issues. Federal district courts within the Tenth Circuit represent the strongest anti-rolling contract sentiment. As will be discussed below, these district courts expressly reject the Seventh Circuit approach. Rounding out the survey of U.S. jurisdictions, and as discussed in more detail below, the scarcity of case law on-point within the District of Columbia and the Fourth and Fifth Circuits makes it difficult to predict how a court sitting within these jurisdictions would decide a rolling contracts case.

Beginning with states within the jurisdiction of the First Circuit Court of Appeals, federal and state courts in Massachusetts appear to firmly adopt Seventh Circuit doctrine espoused in *ProCD* and *Hill* regarding the enforcement of rolling contracts.⁸³ Additionally, the law of New Hampshire was interpreted by the Sixth

39 F. Supp. 2d 974, 975 (N.D. Ill. 1999) (following *Hill* and *ProCD* and enforcing a disclaimer packaged with software). The only exception since *ProCD* appears to be a wayward California district court that interpreted Indiana law in refusing to enforce a forum selection clause in a shrink-wrapped agreement. See *Morgan Labs. Inc. v. Micro Data Base Sys., Inc.*, No. C96-3998, 1997 WL 258886, *2, *4 (N.D. Cal. Jan. 22, 1997) (applying Indiana law) (refusing to enforce a forum selection clause shrink-wrapped with software because the preexisting contractual relationship was integrated).

⁸¹ See *supra* note 51 and accompanying text.

⁸² See *supra* note 78 and accompanying text.

⁸³ See *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (extending “pay now, terms later” to clicking “I Agree” on a computer); *Green Book Int’l Corp. v. Inunity Corp.*, 2 F. Supp. 2d 112, 112 (D. Mass. 1998) (enforcing a shrink-wrap distribution license without comment in denying a preliminary injunction); *1-A Equip. Co. v. Icode, Inc.*, No. 1460, 2003 WL 549913, at *2 (Mass. App. Ct. Feb. 21, 2003) (applying Virginia law) (“We adopt the rationale of [*Hill* and *ProCD*].”); *GSI Lumonics, Inc. v. BioDiscovery, Inc.*, 112 F. Supp. 2d 99, 105 (D. Mass. 2000) (assuming the validity of shrinkwrap license without comment).

Circuit in accord with *Hill*.⁸⁴ Conversely, the Rhode Island Supreme Court distinguished *ProCD* in its sole opinion on this issue.⁸⁵

Precedent within the Second Circuit also strongly favors rolling contracts with few exceptions. At the federal level, the Second Circuit Court of Appeals has cited *ProCD* with approval⁸⁶ and the Southern District of New York has upheld the enforceability of “browse-wrap”, the cyberspace equivalent of shrinkwrap.⁸⁷ Legions of New York state court opinions from the Appellate Division all the way down to trial courts repeatedly affirm that *ProCD* and *Hill* are adopted as a matter of New York law.⁸⁸ The sole notable exception within New York appears to be a maverick New York City Civil Court that expressly criticized and rejected *ProCD*.⁸⁹ Finally, authority in Connecticut state court accepts the Seventh Circuit approach without comment.⁹⁰

⁸⁴ See *Micro Data Base Sys., Inc. v. Dharma Sys., Inc.*, 148 F.3d 649, 654–55 (7th Cir. 1998) (applying New Hampshire law) (holding that under N.H. law custom software was a good under the U.C.C. and that the buyer had accepted the good by failing to reject within a reasonable time).

⁸⁵ See *Defontes v. Dell Computers Corp.*, No. C.A. PC 03-2636, 2004 WL 253560, at *7 (R.I. Jan. 29, 2004) (distinguishing *ProCD* and stating that the “Terms and Conditions Agreement also hinges on whether a reasonable person would have known that return of the product would serve as rejection of those terms.”).

⁸⁶ See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 850 (2d Cir. 1997) (citing *ProCD* approvingly both for copyright misappropriation and, in dicta, for enforceability of shrinkwrap);

⁸⁷ See *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000) (enforcing a “browse-wrap” agreement and reasoning that by accessing the website a person assented to terms, whether read or not).

⁸⁸ *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002) (“[T]he defendant offered a contract that the plaintiff accepted by using the software after having an opportunity to read the license at leisure.”); *Scott v. Bell Atl. Corp.*, 726 N.Y.S.2d 60, 64 (N.Y. App. Div. 2001), *aff’d as modified* by *Goshen v. Mutual Life Ins. Co. of New York*, 774 N.E.2d 1190, 1190 (N.Y. 2002) (finding contract enforceable regardless of actual notice pursuant to *ProCD* and *Hill* but adds that “click-wrap” is acceptable where assent is required for installation); *Against Gravity Apparel, Inc. v. Quarterdeck Corp.*, 699 N.Y.S.2d 368, 369–70 (N.Y. App. Div. 1999) (enforcing shrink-wrapped disclaimer without comment); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998) (adopting *ProCD* and *Hill*, stating “we agree with their rationale” and enforces an arbitration clause given after payment stating, “Transactions involving ‘cash now, terms later’ have become commonplace.”); *Great Am. Ins. Agency v. United Parcel Serv.*, 772 N.Y.S.2d 486, 490 (N.Y. Sup. Ct. 2004) (“[A]cquiescing to a license upon the opening of a shrink-wrapped UPS software package and the installation of the software has also been found sufficient for contract purposes”); *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d 1060, 1062 (N.Y. Sup. Ct. 1997) (rejecting the applicability of U.C.C. § 2-207 per *ProCD*).

⁸⁹ See *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 389 (N.Y. Civ. Ct. 2001). After accepting that *ProCD* and *Hill* are followed in N.Y. to establish contract formation, this court refuses to enforce an arbitration clause, stating:

Courts within the Sixth, Eighth, and Eleventh Circuits appear to generally favor the enforceability of shrinkwrap agreements, though courts in these jurisdictions have spoken with far less frequency than those within the First and Second Circuits. For example, in addition to the Sixth Circuit opinion discussed above,⁹¹ opinions by an Ohio state Appellate Court and a Tennessee District Court lean toward the Seventh Circuit approach.⁹²

Like the Sixth Circuit courts, the courts within the Eighth Circuit also appear to generally lean towards following the *ProCD* doctrine.⁹³ Within the Eleventh Circuit, two leading cases prior to *ProCD*, *Arizona Retail Systems* and *Step-Saver Data Systems*, both applied Georgia law in finding shrink-wrapped contracts unenforceable.⁹⁴ However, in the only reported decision since *ProCD* by a court

Accepting these holdings as being applicable, if the defendant, as a term and condition of filing a claim, required the consumer to sing "O Sole Mio" in Yiddish while standing on his or her head in Macy's window, only Mandy Patinkin would qualify to object to the receipt of defective equipment. This cannot be so . . . All terms of the 'Agreement' should not be enforced merely because the consumer retains the equipment for 30 days after receipt, especially because it is unclear when the 30-day period to protest begins.

See id. at 391-92.

⁹⁰ *See* *Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1062 & n.26 (Conn. Super. Ct. 2002) (enforcing a 'money now, terms later' transaction without reasoning).

⁹¹ *See supra* note 84.

⁹² *See* *Paragon Networks, Int'l. v. Macola, Inc.*, No. 9-99-2, 1999 WL 280385, at *3 (Ohio Ct. App. Apr. 28, 1999) (enforcing a 90-day limitation in the shrink-wrapped warranty of software advertised as being Year 2000 compliant where complainant failed to argue lack of assent to the warranty terms at trial); *see also* *McDonald's Corp. v. Shop At Home, Inc.*, 82 F. Supp. 2d 801, 801 (M.D. Tenn. 2000) (implying generally the enforceability of a shrink-wrap license agreement between company and its franchisees dictating the terms of distribution of certain promotional items while determining no license existed on other grounds).

⁹³ *See* *i-Systems, Inc. v. Softwares, Inc.*, No. 02-1951 JRTFLN 2004 WL 742082, *6-*7 (D. Minn. Mar. 29, 2004) (emphasizing notice of shrink-wrapped terms and citing *ProCD* as an example of an enforceable shrink-wrap agreement in denying a motion to dismiss, without deciding enforceability); *Pioneer Hi-Bred Int'l, Inc. v. Ottawa Plant Food, Inc.*, 283 F. Supp. 2d 1018, 1034-35 (N.D. Iowa 2003) (enforcing a "limited label license" which restricted the resale of a strain of corn).

⁹⁴ *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 765 (D. Ariz. 1993) (applying Georgia law) (holding that a shrink-wrapped license is a proposal to modify a contract and rejecting the unaccented to provisions under U.C.C. § 2-209); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (D. Pa. 1991) (applying Georgia law) (refusing to enforce a "box-top" agreement contained on software, stating that "[w]hen a disclaimer is not expressed until after the contract is formed, UCC § 2-207 governs the interpretation of the contract, and, between merchants, such disclaimers, to

actually within the Eleventh Circuit, a Florida Court upheld shrink-wrapped provisions.⁹⁵

General acceptance of the Seventh Circuit approach, though with some reservations, is evidenced by opinions with the Third Circuit. The Third Circuit Court of Appeals held a shrink-wrap agreement unenforceable in the pre-*ProCD* opinion of *Step-Saver Data Systems, Inc. v. Wyse Technology*.⁹⁶ Since *ProCD*, courts within the Third Circuit have continued to look for express assent to shrink-wrapped terms in determining their enforceability and have applied U.C.C. § 2-207 in true “battle of the forms” situations involving shrink-wrapped agreements.⁹⁷ However, courts within the Third Circuit have indicated their approval of *ProCD* and *Hill* on several occasions⁹⁸ and none has rejected *ProCD* on all fours.

the extent they materially alter the party's agreement, are not incorporated into the [party's] agreement.”)

⁹⁵ See *Management Computer Controls, Inc. v. Charles Perry Const., Inc.*, 743 So. 2d 627, 631–32 (Fla. Ct. App. 1999) (enforcing shrink-wrapped choice-of-law provisions referenced by sales agreement without comment).

⁹⁶ *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991) (applying Georgia law) (refusing to enforce a “box-top” agreement contained on software, stating that “[w]hen a disclaimer is not expressed until after the contract is formed, UCC § 2-207 governs the interpretation of the contract, and, between merchants, such disclaimers, to the extent they materially alter the party's agreement, are not incorporated into the party's agreement.”).

⁹⁷ See *CEGG, Inc. v. Magic Software Enters., Inc.*, 51 Fed. Appx. 359, 363–64 (3d Cir. 2002) (While upholding summary judgment, the court enforced the terms of a shrink-wrapped evaluation-software agreement and dropped terms written on the purchase order for the final version of the software. The court used U.C.C. § 2-207 to analyze the case and found the customer's purchase order for the full version of the software, which included a provision for unlimited use of the evaluation software, was a material alteration of the terms of the evaluation software, which became effective when the software was installed per the shrink-wrapped agreement.); *Greenfield v. Twin Vision Graphics, Inc.*, 268 F. Supp. 2d 358, 375 (D.N.J. 2003) (enforcing shrinkwrap agreement and distinguishing *Step-Saver* where customer manifested assent to post-sale terms by signature).

⁹⁸ See *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000) (stating the reasoning in *ProCD* is “insightful” in dicta only and enforcing a shrink-wrap disclaimer on the grounds that the party expressly assented); *Info. Handling Servs. v. LRP Publ'ns., Inc.*, No. 00–1859, 2000 U.S. Dist. LEXIS 14531, at *5–*6 (D. Pa. Sept. 20, 2000) (“I can see no reason not to enforce the contract . . . Defendant . . . was free to reject it and return the CD-ROM disc to IHS. Defendant chose not to do so, and therefore is bound by its terms.”); *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at *3 (Del. Ch. Mar. 16, 2000) (The court cites *Hill* while enforcing a “pay now, terms later” arbitration agreement contained in an internet services Terms of Use. The court then applies that agreement to the purchase of a computer, stating it is a “related purchase” by meaning of the ISP contract.); *Rinaldi v. Iomaga*

The Ninth Circuit is somewhat of a mixed bag, with some courts expressly adopting and even extending *ProCD* while others limit its doctrine. Washington state courts were some of the first to adopt *ProCD* within the Ninth Circuit and have reaffirmed this doctrine recently.⁹⁹ Recent opinions of the Central District of California similarly demonstrate its support of the Seventh Circuit approach,¹⁰⁰ while the Southern District, in an early case, required actual notice for “money now, terms later” agreements.¹⁰¹ Interestingly, the Northern District of California has repeatedly enforced shrink-wrapped End User License Agreements (EULA) against software resellers despite lack of actual notice (and the fact that resellers are not “end users”) while the Central District has refused to do so.¹⁰² In a final twist in Ninth Circuit law on shrink-wrapped agreements, there is a split of authority with regard to the enforceability of “browse-wrap” agreements where an

Corp., No. 98C-064-RRC, 1999 WL 1442014, at *3-*5, *7 (Del. Super. Ct. 1999) (discussing *ProCD* and *Hill* approvingly and enforcing a conspicuously placed shrink-wrapped disclaimer presented after initial contract).

⁹⁹ See *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 47 P.3d 940, 943 (Wash. 2002) (holding that terms contained on the invoice and on the search reports purchased by the customer were enforceable); *M.A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803, 809 (Wash. Ct. App. 1999) (“We find the Seventh Circuit’s reasoning persuasive . . .”).

¹⁰⁰ See *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Ca. 2002) (citing *ProCD* and *Hill* while enforcing an arbitration agreement received long after payment for services); *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1073 (C.D. Cal. 2002) (enforcing an arbitration clause in a “Welcome Guide” and accepting terms after transaction).

¹⁰¹ See *Microstar v. Formgen, Inc.*, 942 F. Supp. 1312, 1317-18 (S.D. Cal. 1996) (limiting *ProCD* by emphasizing actual notice of the contractual provisions in shrink-wrapped agreements) *aff’d in part, rev’d in part*, *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1107 (9th Cir. 1998) (failing to discuss the shrink-wrapped agreement).

¹⁰² Compare *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1090-91 (N.D. Cal. 2000) (using the terms of a shrink-wrapped EULA to find a license agreement with the reseller of that software, although reseller is not an end user); with *Softman Products Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1082, 1084-88, nn.6 & 12 (C.D. Cal. 2001) (finding that boxed software is a good, not a license for purposes of a reseller and a EULA is not applicable to a reseller of software because the reseller has no notice of its terms and therefore cannot assent to its terms) Finally, the court distinguished *One Stop Micro, supra*, as involving the opening, alteration, and resealing of Adobe’s product.); with *Adobe Systems, Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1056-60 (N.D. Cal. 2002) (reaffirming the analysis in *One Stop Micro, supra*, finding a license agreement against the reseller based on the contract signed by the reseller’s vendor and the EULA).

Internet visitor is constructively assumed to assent to the terms of a web-page by virtue of his use of the site.¹⁰³

Courts within the Tenth Circuit represent the strongest opposition to the *ProCD* and *Hill* opinions. The Tenth Circuit Court of Appeals has not spoken on the issue, Federal District Courts in Kansas and Utah have consistently rejected the Seventh Circuit's approach and have refused to enforce shrink-wrapped agreements.¹⁰⁴ No state supreme court within the Tenth Circuit has yet addressed the issue.

The final category of jurisdictions is that for which the enforceability of rolling contracts has little or no case precedent. With so few cases on point, no clear indication of the mood of courts in the District of Columbia or the Fourth and Fifth Circuits is apparent. The District Court of Columbia Court of Appeals has not spoken on the enforceability of rolling contracts per se. However, it has upheld a forum selection clause appearing in a scroll box where a user clicked the "Accept" button.¹⁰⁵

While one state court within the First Circuit has interpreted Virginia law (without citing Virginia or Fourth Circuit precedent) to expressly adopt the rationale of *ProCD* and *Hill*,¹⁰⁶ no court actually within the Fourth Circuit has

¹⁰³ *Compare* Ticketmaster Corp. v. Tickets.com, Inc., No. CV-99-7654, 2000 WL 525390, *3 (C.D. Cal. Mar. 27, 2000) (refusing to extend "shrink-wrap" analysis to "browse wrap" situations, and dismissing a breach of contract action); *with* Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (referencing positively the policy considerations of *ProCD*, proposes the extension of "shrink-wrap" license analysis to a "browse wrap" license and accordingly refuses to dismiss a claim because the agreement "may be arguably valid and enforceable."); *see also* Specht v. Netscape Communications Corp., 306 F.3d 17, 30-31 (2d Cir. 2002) (applying California law) (finding that a "browse wrap" agreement requires that the reasonably prudent offeree be made aware of its terms so as to manifest assent and refusing to enforce an arbitration agreement).

¹⁰⁴ *See* Kloczek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (holding an arbitration clause contained in documents shipped inside product packaging unenforceable, noted the analytical deficiency of *ProCD* and *Hill*, and applied U.C.C. § 2-207 stating that the purchaser is the "master of the offer" and the seller must clearly state any express conditions to the sale.); *U.S. Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201, 1205 (D. Kan. 1998) (holding a "single use only" restriction on packaging for surgical equipment unenforceable); *Novell, Inc. v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1229 (D. Utah 1997) (holding software to be a good, end users to be owners, not licensees, and declaring shrink-wrap agreements unenforceable).

¹⁰⁵ *See* Forrest v. Verizon Communications, Inc., 805 A.2d 1007, 1010-11 (D.C. Ct. App 2002) (holding that scroll box containing a thirteen-page boiler plate contract was adequate of notice of a forum selection clause where user clicked the "Agree" button to order DSL service).

¹⁰⁶ *See* 1-A Equip. Co. v. Icode, Inc., No. 1460, 2003 WL 549913, at *2 (Mass. App. Div. Feb. 21, 2003) (applying Virginia law) ("We adopt the rationale of [*Hill* and *ProCD*].").

done so in a reported case. In fact, at least one court within the Fourth Circuit held that shrink-wrapped contracts containing arbitration agreements cannot be constructively accepted by buyers.¹⁰⁷

The only court within the Fifth Circuit to speak on the issue adopted “money now, terms later” with regard to terms contained in a telephone equipment box but carefully limited its holding to the facts of the case.¹⁰⁸ This decision, however, since this decision applied the law of Louisiana, the only U.S. state not to adopt the U.C.C. Article 2, it is of little value in determining the adoption of *ProCD* within the Fifth Circuit.

2. 2003 Amendments to U.C.C. Warranty Provisions Would Expressly Enforce Tripartite Rolling Contracts

The 2003 amendments to Article 2, now available to the states for adoption,¹⁰⁹ offer insight into the direction the law may take in the near future with regard to tripartite rolling contracts. The 2003 amendments to current U.C.C. § 2-313, covering express warranties, includes two new subsections. The first subsection § 2-313A, “Obligation To Remote Purchaser Created By Record Packaged With Or Accompanying Goods,” specifies the rights and obligations where a manufacturer passes along shrinkwrap agreements to the consumer via a retailer. In other words, this subsection would expressly codify the enforcement of tripartite rolling contracts or their functional equivalent under the code’s slightly altered terminology.

The new section 2-313A begins by labeling the parties to the tripartite transaction. A new term, “immediate buyer,” is defined as one who “enters into a contract with the seller.”¹¹⁰ The definition of “seller” is left substantively unchanged by the Article 2 Amendments. It continues to be the entity that “sells

¹⁰⁷ See *Mattingly v. Hughes Elec. Corp.*, 810 A.2d 498, 506 (Md. Ct. Spec. App. 2002) (holding that a person cannot “constructively accept” an arbitration agreement as part of the “change of terms” clause in a DirecTV® contract without regard for the actual notice received by the customer.).

¹⁰⁸ See *O’Quinn v. Verizon Wireless*, 256 F. Supp. 2d 512, 516 (M.D. La. 2003).

¹⁰⁹ The Amendments to U.C.C. Article 2 were approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) in 2003. No state legislature has yet introduced a bill that would adopt the amendments. See Uniform Law Commissioners: Amendments to UCC Articles 2 and 2A, available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc22A03.asp (last visited September 21, 2004). The amended text of Article 2 will be referred to herein as “2003 Amendments,” “the Amendments,” or as being the “new” Article 2. All references to U.C.C. sections not so designated refer to the version of Article 2 currently enacted in all fifty states.

¹¹⁰ U.C.C. §§ 2-313(1), 2-313A(1)(a), & 2-313B(1)(a) (amended 2003).

or contracts to sell goods.”¹¹¹ In defining another new term, “remote purchaser,” the amendments clarify how the parties in a tripartite rolling contract would be labeled. A “remote purchaser” is “a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.”¹¹² Thus, in a typical retail transaction, the consumer is labeled a “remote purchaser,” the retailer is the “immediate buyer,” and the remaining party to the transaction, the manufacturer, must be the “seller.”¹¹³

New section 2-313A(3) creates the statutory backing for the rolling contract transaction in the sale of new goods,¹¹⁴ stating:

If a seller in a record packaged with or accompanying the goods makes an affirmation of fact or promise that relates to the goods . . . and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that: (a) the goods will conform . . . and (b) the seller will perform the remedial promise.¹¹⁵

Use of the new term “obligation” in place of “express warranty” throughout §§ 2-313, 2-313A, and 2-313B is meant to clarify that “no direct contract exists between the seller and remote purchaser.” This term thereby avoids “any inference that that the basis of the bargain test is applicable here.”¹¹⁶ Therefore, the controversial “battle of the forms” issue that arose in the *ProCD* litigation is sidestepped on a more surefooted basis than Judge Easterbrook’s much criticized pronouncement in *ProCD* that § 2-207 is somehow irrelevant when only one form is involved.¹¹⁷ The amended act would simply create the functional equivalent of the sort of rolling contract envisioned by *ProCD* while avoiding the baggage associated with the word warranty.

Remedies are governed by § 2-313A(5). This section affirms *ProCD*’s contention that a manufacturer (which would be “the seller” in a tripartite transaction under the amended language) can limit the consumer (“remote

¹¹¹ U.C.C. § 2-103(1)(o) (1999).

¹¹² U.C.C. §§ 2-313A(1)(b), 2-313B(1)(b) (amended 2003).

¹¹³ U.C.C. § 2-313A Proposed Comment 2 confirms this understanding by describing “the chain of distribution” as including the seller at the beginning of the chain, the “public” at the end, and a retailer (along with potentially other parties) in the middle. The comment proceeds to state, “A buyer or lessee from the retailer would qualify as a remote purchaser and could invoke this section against . . . the manufacturer. . . .” U.C.C. § 2-313A cmt. 2 (amended 2003).

¹¹⁴ U.C.C. § 2-313A(2) (amended 2003) is subject to § 2-313A(1) which restricts the scope of § 2-313A to “new goods sold or leased . . . in the normal chain of distribution.”

¹¹⁵ U.C.C. § 2-313A(2) (amended 2003).

¹¹⁶ U.C.C. § 2-313A (amended 2003) Proposed Official Comment 1.

¹¹⁷ See *supra* note 45 and accompanying text.

purchaser”)’s remedies through the shrinkwrap terms (“the record”). Such “modification or limitation” is permissible so long as the terms that modify or limit the remedy are either delivered at the time of purchase or are contained in the record that creates the obligation (the duty akin to “express warranty”).¹¹⁸ A consumer’s rights in case of breach of the obligation, if not knocked out by the manufacturer’s limitation, include “the loss resulting in the ordinary course of events as determined in any manner that is reasonable”¹¹⁹ along with “incidental or consequential damages . . . but . . . not . . . lost profits.”¹²⁰

Thus, the 2003 Amendments codify the functional equivalent of the tripartite rolling contract enforced in *ProCD*. In the language of the Act, the when a remote purchaser triggers the mode of acceptance specified in a record delivered to him from the seller via the immediate buyer, the seller’s obligations and limitations specified in the record become effective.¹²¹

3. The Uniform Computer Information Transactions Act (UCITA) Offers Additional Support for Enforcing Tripartite Rolling Contracts in Software Purchases

Where transactions in computer information are concerned,¹²² rolling contracts as envisioned by *ProCD* find support in the final draft of the Uniform Computer Information Transactions Act (herein “UCITA”). The decade long draft of UCITA completed by the National Conference of Commissioners on Uniform State Laws (herein “NCCUSL”) in 2002 has had a troubled history¹²³

¹¹⁸ U.C.C. § 2-313A(4)(a) (amended 2003).

¹¹⁹ U.C.C. § 2-313A(4)(c) (amended 2003).

¹²⁰ U.C.C. § 2-313A(4)(b) (amended 2003).

¹²¹ U.C.C. § 2-313A (amended 2003).

¹²² UCITA’s scope is generally limited to computer information transactions. *See* UCITA § 103(a) (2001). In transactions that mix goods and computer information, such as the iBreak product in the hypothetical, UCITA’s application is strictly limited to the part that involves the computer information. *See* UCITA § 103(b) (2001).

¹²³ The American Bar Association’s (ABA) imprimatur on UCITA is conspicuously lacking. When the two groups could not come to terms on the language of the act NCCUSL removed UCITA from the ABA agenda on February 10, 2003. *See* NCCUSL press release (February 10, 2003), available at http://www.nccusl.org/nccusl/ucita/UCITA_ABA_0203.pdf (last accessed March 16, 2003). Significant opposition to UCITA was also voiced by some twenty-five state’s attorney’s general due to concerns for consumer protection. *See* Erika E. Schinler, Comment, *Trouble at the Sausage Factory: Has the Uniform Computer Information Transactions Act Been Unjustly Stigmatized?*, 75 TUL. L. REV. 507, 509, 525–31 (2000) (discussing the July 1999 letter of the twenty-five state’s attorneys general attacking UCITA).

and does not appear destined for wide adoption by the states any time soon.¹²⁴ However, the sheer comprehensiveness of the proposed statute together with the significance of its authoring body, NCCUSL, does provide some indication of the direction the law is likely to move in the future with regard to tripartite rolling contracts involving computer information.

The key provision of UCITA that would largely codify the *ProCD*'s authorization of rolling contracts is Section 208, "Adopting Terms of Records."¹²⁵ Under this provision, "a party," such as Joe Consumer in the hypothetical, may adopt the terms of a standardized form, i.e. a shrinkwrap agreement, by manifesting assent to it.¹²⁶ This adoption may be made even "after beginning performance or use," i.e. (having i.e. twice in two sentences is awkward) well after Joe Consumer leaves the store with the product and including his initial use of the iBreak software, so long as "the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there would not be an opportunity to review the record or a copy of it before performance or use begins."¹²⁷ Once adopted, the terms become part of the contract whether or not the parties have knowledge or understanding of them.¹²⁸

IV. REVOCATION OF ACCEPTANCE

The previous section detailed the legal evolution of rolling contracts involving three parties: a buyer, a retail seller, and a remote manufacturer. In this section the same tripartite relationship is explored under the rubric of U.C.C. § 2-608, Revocation of Acceptance. As will be shown, once the tripartite relationship is established, buyers in many jurisdictions lose a right they have in traditional bipartite transactions: the right to revoke acceptance.

A. If You Can't Reject 'Em, Revoke 'Em

Acceptance of goods is the signal legal moment when risk of loss and the burden of going forward in a contract dispute shifts from the seller to the

¹²⁴ To date, the only states to adopt UCITA are Maryland and Virginia. See VA. CODE ANN. §§ 59.1-501.1 to 509.2 (Michie 2001 & Supp. 2004); MD. CODE ANN., COM. LAW II §§ 22-101 to 22-816 (Supp. 2003).

¹²⁵ UCITA § 208 Comment 3 makes clear that this section of the act is meant to recognize that "many transactions involve a rolling or layered process" and specifically adopts the rule of *ProCD*. UCITA § 208 cmt.3 (2001).

¹²⁶ UCITA § 208(1) (2001).

¹²⁷ UCITA § 208(2) (2001).

¹²⁸ UCITA § 208(3) (2001).

buyer.¹²⁹ Prior to this point the buyer is provided an opportunity to inspect the goods¹³⁰ and may reject them in whole or in part if the seller has failed to make a perfect tender.¹³¹ A buyer who exercises his right to reject non-conforming goods has only a duty to "hold [the goods] with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them"¹³² and to avoid "any exercise of ownership."¹³³ Otherwise, "the buyer has no further obligations to goods rightfully rejected."¹³⁴

Acceptance takes place once the buyer has had a reasonable opportunity to inspect the goods and either signifies to the seller that the goods are conforming, fails to make an effective rejection within a reasonable time, or does any act inconsistent with the seller's ownership.¹³⁵ Hence in a typical case, as represented by the hypothetical in Part II.A., *supra*, a buyer who allows the time for rejection¹³⁶ to lapse loses the right to reject the goods.¹³⁷ Default acceptance is often triggered by holding the goods too long due to a consumer's instinct to work with the warrantor of the product to rectify the situation. If this step proves unfruitful, the consumer may no longer reject the goods.

Even after acceptance, the consumer may sue on the contract for breach of warranty. The problem, as highlighted by Joe's trouble in the hypothetical, is that a buyer's options may be very restricted due to the shrinkwrap terms he is now bound by pursuant to *ProCD*. The following are but a few terms a shrinkwrap agreement may impose on the consumer: limitations on warranty protection to only specific parts of the product and for varying periods of coverage, costs for shipping or otherwise transporting the good to the manufacture or authorized dealer, authorization for several weeks without use and enjoyment of the goods while the product is undergoing repair, and numerous circumstances may be

¹²⁹ U.C.C. § 2-607(4) provides "The burden is on the buyer to establish any breach with respect to the goods accepted." U.C.C. § 2-608(2) precludes revocation after acceptance if there is "any substantial change in condition of the goods which is not caused by their own defects." U.C.C. § 2-607(4) (1999).

¹³⁰ U.C.C. § 2-513 provides buyers right to inspect the goods before acceptance. U.C.C. § 2-512(2) makes clear that this right to inspect prior to acceptance is not waived merely by making payment. U.C.C. §§ 2-512(2), 513 (1999).

¹³¹ U.C.C. § 2-601 (1999).

¹³² U.C.C. § 2-602(2)(b) (1999).

¹³³ U.C.C. § 2-602(2)(a) (1999).

¹³⁴ U.C.C. § 2-602(2)(c) (1999).

¹³⁵ U.C.C. § 2-606 (1999).

¹³⁶ U.C.C. § 2-602(1) states that the period in which a buyer must notify the seller of his rejection of goods is "a reasonable time after their delivery or tender." U.C.C. § 2-606(1)(b) adds that this period is at least as long as to allow the buyer a reasonable opportunity to inspect the goods. U.C.C. §§ 2-602(1), 606(1)(b) (1999).

¹³⁷ "Acceptance of goods by the buyer precludes rejection of the goods accepted . . ." U.C.C. § 2-607(2) (1999).

specified under which the warranty is voided. Furthermore, an unsatisfied customer may be bound by shrinkwrap terms that restrict the fora in which he may sue for breach and which damages may be obtainable should the suit be successful. These potential restrictions on the buyer's ability to seek remedy, together with the hassle and expense either dealing with the warrantor or maintaining a lawsuit, can make it difficult for a consumer to obtain justice. Even where the consumer has a good case for demonstrating that these limitations result in the warranty failing its essential purpose, he still faces the expense, time, and trouble of litigating the case or participating in the dispute resolution required in the warranty contract.

In some cases, an alternative to the breach of contract action is available to buyers who have lost their opportunity to simply reject the goods and get a refund. If the buyer meets the requirements specified in U.C.C. § 2-608, explored in the section below, he may revoke his acceptance of the good and is afforded the "same rights . . . as if he had rejected them."¹³⁸

B. When a Buyer May Revoke Acceptance Under Currently Enacted Article 2

As U.C.C. § 2-608 Official Comment One makes clear, the invention of the phrase "revocation of acceptance" was meant to shed the common law baggage associated with the term "rescission" while essentially continuing the prior equitable policy of undoing bad bargains where the circumstances so justify.¹³⁹ Without impeding a buyer's right to seek recovery of damages for breach,¹⁴⁰ U.C.C. § 2-608 states the specific circumstances under which buyers may ask the court to excuse the buyer's prior acceptance and gives qualified buyers equivalent rights to one who had rejected the goods.¹⁴¹ Under U.C.C. § 2-711, a buyer who justifiably revokes pursuant to § 2-608 may cancel the contract and is entitled to recover the amount already paid along with the cost of cover.¹⁴² Furthermore, the buyer is given a security interest in the goods for any amount paid and expenses incurred and may resell the goods to recover this amount in the same manner as an aggrieved seller.¹⁴³

¹³⁸ U.C.C. § 2-608(3) (1999).

¹³⁹ See U.C.C. § 2-608 cmt.1 (1999).

¹⁴⁰ "[T]he buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach." *Id.*

¹⁴¹ U.C.C. § 2-608(3) (1999).

¹⁴² U.C.C. § 2-711(1) (1999). For each of the remedies afforded to justifiably revoking buyers, equivalent rights are afforded to rightfully rejecting buyers. See U.C.C. § 2-711 (1999).

¹⁴³ U.C.C. § 2-711(3) (1999). Hence, the buyer is given leverage against the party whom he justifiably revokes. If the revoking party refuses to provide the full refund and

1. Requirements for Revocation of Acceptance

Taking U.C.C. § 2-608 element by element,¹⁴⁴ several prerequisites to revocation become apparent. First, revocation is only proper where some non-conformity exists.¹⁴⁵ While the meaning of the term "non-conformity" implies the breach of a contract or warranty,¹⁴⁶ a few idiosyncratic jurisdictions continue to allow revocation against a party who has not breached.¹⁴⁷ However, holding non-breaching and/or disclaiming parties harmless in revocation actions is the better reasoned approach and one with substantial case authority.¹⁴⁸ Logically, a party that has neither breached a sales contract nor breached a warranty agreement should not be liable in a revocation action.¹⁴⁹

cover that § 2-711(1) says the buyer is entitled to, then the buyer may take matters into his own hands and recover this amount through re-sale under § 2-711(3).

¹⁴⁴ U.C.C. § 2-608 (1999) "Revocation of Acceptance in Whole or in Part").

¹⁴⁵ U.C.C. § 2-608(1) (1999).

¹⁴⁶ "Non-conformity," an undefined term in the U.C.C., is defined by implication by U.C.C. § 2-106(2), which defines "conforming" goods as those "in accordance with the obligations under the contract." Gary L. Monserud, *Judgment Against a Non-Breaching Seller: The Cost of Outrunning the Law to Do Justice Under Section 2-608 of the Uniform Commercial Code*, 70 N.D. L. REV. 809, 832-33 (1994).

¹⁴⁷ See, e.g., *Troutman v. Pierce, Inc.* 402 N.W.2d 920, 922-23 (N.D. 1987) (allowing revocation against a direct seller for the manufacturer's breach stating that the right to revoke "is not conditioned upon whether it is the seller or the manufacturer that is responsible for the nonconformity."); *Fode v. Capital RV Ctr., Inc.*, 575 N.W.2d 682, 688 (N.D. 1998) ("A buyer is not barred from revoking acceptance despite a seller's disclaimer of warranties."); *Griffith v. Latham Motors, Inc.*, 913 P.2d 572, 577 (Idaho 1996) ("It is not inconsistent . . . for the jury to have found that the [buyer] had a right to revoke acceptance against [seller] but that [seller] had not breached either an express or an implied warranty.").

For a comprehensive survey and strong criticism of cases allowing revocation against a disclaiming direct seller see *Flehtner, supra* note 3, at 414-35 (1998) and *Monserud, supra* note 146, at 814-37 (providing an in-depth analysis and critic of *Troutman*).

¹⁴⁸ See, e.g., *Cissell Mfg. Co. v. Park*, 36 P.3d 85, 89 (Colo. Ct. App. 2001) ("Whether goods are nonconforming requires reference to the terms of the contract and to the law of warranty."); *Gulfwind S., Inc. v. Jones*, 775 So. 2d 311, 313 (Fla. Ct. App. 2000) ("[B]efore a buyer can elect to revoke acceptance, he or she must demonstrate a nonconformity to some provision in the contract."); *Flehtner, supra* note 3, at 403 n.9 (listing seven cases and one concurring opinion refusing to accept revocation against sellers not in breach); *White, supra* note 18, at 1075-79 ("There is considerable precedent for the proposition that sellers are not liable for breach of a manufacturer warranty . . .").

¹⁴⁹ Considering the effect of holding non-breaching and/or disclaiming sellers liable in a revocation action is commensurate to saying that sellers must always warrant their goods. Such a holding is clearly at odds with the express provisions of § 2-316(2) and (3)

The second prerequisite is that the non-conformity must in fact substantially impair its value to the buyer, regardless of the seller's knowledge of the buyer's particular circumstances.¹⁵⁰ As the Virginia Supreme Court explained this requirement:

A buyer's right to revoke acceptance does not arise from every breach of warranty[,] it arises only where the value of the goods to the buyer is substantially impaired...The test of such impairment is not, however, a diminution in value of the goods on the open market, or to the average buyer, but rather a substantial impairment of value to the particular buyer involved.... [T]he buyer must offer objective evidence showing: (1) that the goods fail to conform to the terms of the contract of sale, and (2) that the nonconformity substantially impairs the value of the goods to the buyer.¹⁵¹

Other courts have required a more subjective test for whether the goods substantially impair their value to a particular buyer.¹⁵² These courts follow the "shaken faith doctrine,"¹⁵³ where, especially in extreme cases, the nonconformity is found based on the negative feelings the consumer understandably engenders towards a good that, for instance, puts the buyer's personal health at risk¹⁵⁴ or has

which provide numerous examples on how sellers may disclaim the implied warranties of merchantability and fitness for a particular purpose. See *supra* note 21 and accompanying text. See also Monserud, *supra* note 146, at 835 (1994) (pointing out that "nothing in Article 2 establishes vicarious liability [for non-breaching parties]" and that the language of the remedial section of Article 2 (Part 7) "strongly implies that any defendant against whom remedies can be employed must be a party in breach."); Flechtner, *supra* note 3, at 434-35; compare White, *supra* note 18, at 1055-59, 1061, 1069. White argues that manufacturers are the most efficient product insurers in most market situations. He nevertheless concludes that since revocation is not allowed against remote manufacturers in most jurisdictions sellers should bear the liability where they agree to take responsibility for warranty service. See *id.*

¹⁵⁰ See U.C.C. § 2-608(1)(a) & cmt.2 (1999).

¹⁵¹ Gasque v. Mooers Motor Car Co., Inc., 313 S.E.2d 384, 388-89 (Va. 1984).

¹⁵² *Id.* at 386-87.

¹⁵³ *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195, 205 (N.J. Super. 1968) (allowing revocation and stating famously, "[o]nce their faith is shaken, the [good] loses not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension. The attempted cure [replacement] in the present case was ineffective.").

¹⁵⁴ See *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 177 (Ill. App. Ct. 1972) ("[T]here can be little doubt that defendants' car, after having had the transmission fall out, and then experiencing a complete failure of the brakes (both dangerous occurrences while defendant was traveling on an expressway), was so hazardous to drive that the value of defendants' contract for the car was substantially impaired.").

been a terrible inconvenience.¹⁵⁵ The common refrain in such cases is that the warranty “fails of its essential purpose” where, for instance, the non-conformity persists despite numerous attempts by the authorized warranty service repair shop to cure the non-conformity.¹⁵⁶

The third requirement is that the buyer’s acceptance of the good must be excusable despite the presence of the non-conformity. This condition is met if either the buyer accepted the good “on the reasonable assumption that its non-conformity would be cured” or if the buyer did not discover the non-conformity at the time of acceptance.¹⁵⁷ Where the buyer claims the latter, he must further prove that he was “reasonably induced” to believe the goods were conforming either because of “the difficulty of discovery before acceptance or by the seller’s assurances.”¹⁵⁸

Next, the buyer must supply a sufficient¹⁵⁹ notice to the seller within a reasonable time after he discovers or should have discovered the grounds for revocation.¹⁶⁰ This condition is of vital concern in light of U.C.C. § 2-607’s ultimatum: “the buyer must within a reasonable time . . . notify the seller of breach or be barred from any remedy.”¹⁶¹ Also, in order to protect his right to revoke acceptance of goods, the buyer must ensure that the goods do not undergo “any substantial change in condition . . . not caused by their own defects.”¹⁶²

In a tripartite rolling contract context, assuming the above requirements have been met, the final hurdle facing a revoking buyer is the following: against whom may the buyer exercise her power of revocation? Where the buyer has purchased the goods from a solvent retailer who warrants the goods, the issue is

¹⁵⁵ *Tiger Motor Co., Inc. v. McMurtry*, 224 So. 2d 638, 646 & n.5, (Ala. 1969) (finding substantial impairment of value where a new car was returned to dealer more than 30 times for repair).

¹⁵⁶ *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1977) (en banc) (finding that a succession of minor repairs demonstrated that the warranty for repair failed of its essential purpose).

¹⁵⁷ U.C.C. § 2-608(1)(a), (b) (1999).

¹⁵⁸ U.C.C. § 2-608(1)(b).

¹⁵⁹ “Sufficient” content of the notice required under U.C.C. § 2-608 is generally more than mere notification of breach as is required for rejection under U.C.C. § 2-607. See U.C.C. § 2-608 cmt.5 (amended 2003).

¹⁶⁰ See U.C.C. § 2-608(2) (amended 2003). Official Comment 4 to § 2-608 provides some guidance on what is a reasonable amount of time. “[T]he reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender.” U.C.C. § 2-608 cmt.4 (amended 2003).

¹⁶¹ See U.C.C. § 2-607(3)(a) (1999). The Official Comment 4 to § 2-607, explains that “a reasonable time” for notification from a retail consumer is longer than that of a merchant because the rule “is designed to prevent commercial bad faith, not deprive a good faith consumer of his remedy.”

¹⁶² See U.C.C. § 2-608(2) (amended 2003).

uncontroversial. In a typical case the buyer will simply bring back the goods and get her refund from the breaching seller. Where such convenience is not feasible, however—for example, if the retailer has gone out of business or the seller disclaimed all warranties—the buyer must look for other ways to be satisfied. Can the manufacturer who included shrinkwrapped terms inside the product packaging be a source of relief for purposes of the revocation action? The next two sections address the split of authority on this issue.

2. *The Majority View: Revocation Proper Against Direct Sellers Only*

Most courts that have faced the issue have found that a buyer may not revoke acceptance under § 2-608 against a remote manufacturer with whom the buyer is not in privity of sales contract. Professor Gary L. Monserud cataloged twelve relevant cases in a pair of articles published in 1994.¹⁶³ Supplementing and updating Professor Monserud's work, I have identified at least ten additional cases following the majority view.¹⁶⁴

¹⁶³ As reported by Professor Monserud, these cases are the following:

Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208, 1211 (6th Cir. 1974) (applying Ohio law); Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210, 214 (Ariz. 1981); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144, 149–50 (Conn. 1976); Volvo of Am. Corp. v. Wells, 551 S.W.2d 826, 829 (Ky. Ct. App. 1977); Henderson v. Chrysler Corp., 477 N.W.2d 505, 507 (Mich. Ct. App. 1991); Alberti v. Manufactured Homes, Inc., 381 S.E.2d 478, 480 (N.C. Ct. App. 1989), *aff'd in part, rev'd in part, vacated in part*, 407 S.E.2d 819 (N.C. 1991); Wright v. O'Neal Motors, Inc., 291 S.E.2d 165, 169 (N.C. Ct. App. 1982); Cooper v. Mason, 188 S.E.2d 653, 655 (N.C. Ct. App. 1972); Edelstein v. Toyota Motor Distrib., 422 A.2d 101, 104 (N.J. Super. Ct. App. Div. 1980); Noice v. Paul's Marine & Camping Ctr., Inc., 451 N.E.2d 528, 532 (Ohio Ct. App. 1982); Fun[k] v. Montgomery AMC/Jeep/Renault, 586 N.E.2d 1113, 1116–17 (Ohio Ct. App. 1990); Gasque v. Mooers Motor Car Co., Inc., 313 S.E.2d 384, 390 (Va. 1984); Reece v. Yeager Ford Sales, Inc., 184 S.E.2d 727, 731 (W. Va. 1971); Crume v. Ford Motor Co., 653 P.2d 564, 566 (Or. Ct. App. 1982). See also Andover Air Ltd. P'ship v. Piper Aircraft Corp., 7 U.C.C. Rep. Serv. 2d (Callaghan) 1494, 1500 (D. Mass. 1989) (assuming that the Massachusetts Supreme Judicial Court would follow the majority); Ayanru v. Gen. Motors Acceptance Corp., 495 N.Y.S.2d 1018, 1023 (N.Y. Civ. Ct. 1985) (finding revocation effective only between buyer and person who sells or contracts to sell goods); Hart Honey Co. v. Cudworth, 446 N.W.2d 742, 744 (N.D. 1989) (defining the term "seller" with reference to WHITE & SUMMERS § 8-4 (3d ed. 1988), thus aligning itself with the majority).

Monserud, *supra* note 146, at 812 n.20 (1994); see also Gary L. Monserud, *Rounding Out the Remedial Structure of Article 2: The Case for a Forced Exchange Between a Buyer and a Remote Seller*, 19 U. DAYTON L. REV. 353, 359–366 (1994) (discussing several of the majority view cases).

¹⁶⁴ The additional majority-view cases, barring revocation of acceptance by a buyer against a remote manufacturer, are the following: Kutzler v. Thor Indus., Inc., No. 03-C2389, 2003 U.S. Dist. LEXIS 11886, at *23 (N.D. Ill. July 11, 2003) (noting a conflict

Textually, the majority view takes its root in the undisputed fact that the currently enacted version of U.C.C. § 2-608 refers in several places to “the seller.”¹⁶⁵ The term “seller” is defined in U.C.C. § 2-103(d) as “a person who sells or contracts to sell goods.”¹⁶⁶ Furthermore, a “sale” is defined by U.C.C. § 2-106(1) as “the passing of title from the seller to the buyer for a price.”¹⁶⁷ Thus, the argument goes, since title does not pass from the manufacturer directly to the consumer, but instead passes via an intermediary retailer, the manufacturer cannot be considered a seller as required by § 2-608. The lack of privity in the sales contract would therefore allow a manufacturer who may actually be in breach of warranty to escape liability under the revocation theory, forcing the consumer to seek remedy on the manufacturer’s terms pursuant to the shrinkwrapped agreement. Stated another way, the majority view is that revocation against a

of authority among Illinois courts and electing to follow the Virginia Supreme Court’s decision in *Gasque*, 313 S.E.2d at 390, which barred revocation as “conceptually inapplicable” to manufacturers not in privity.); *Neal v. SMC Corp.*, 99 S.W.3d 813, 817–18 (Tex. App. 2003) (“[T]he remedy of revocation is available to the buyer only against the immediate seller and . . . the manufacturer, in the absence of a contractual relationship with the consumer, is not a seller. A manufacturer’s express warranty does not provide a contractual relationship to the sale under section 2.608.”); *Miller v. Pettibone Corp.*, 693 So. 2d 1372, 1375 (Ala. 1997); *Griffith v. Latham Motors, Inc.*, 913 P.2d 572, 577 (Idaho 1996) (restricting revocation to a direct seller, thus following the majority view, but allowing revocation against such a seller even where there is no breach); *Hardy v. Winnebago Indus., Inc.*, 706 A.2d 1086, 1091 (Md. App. 1998); *Duall Bldg. Restoration, Inc. v. 1143 E. Jersey Ave. Assocs., Inc.*, 652 A.2d 1225, 1229 (N.J. Super. Ct. App. Div. 1995) (stating in dicta that if plaintiff’s cause of action for breach of warranty was not upheld then the buyer “would be substantially without a remedy against the manufacturer for economic injury resulting from its producing and selling a defective product.”); *Aluminum Line Prods. Co. v. Rolls-Royce Motors, Inc.*, 649 N.E.2d 887, 893 (Ohio Ct. App. 1994); *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 323 (D.C. Md. 1983) (holding that a buyer “is required to establish privity of contract between itself and [the remote manufacturer] in order to maintain [all] the claims it asserts,” which included a claim for revocation of acceptance); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1028 (Miss. 1982) (no revocation of acceptance allowed against remote manufacturer for breach of implied warranty of merchantability); *Clark v. Ford Motor Co.*, 612 P.2d 316, 319 (Or. Ct. App 1980) (establishing as a matter of law that a buyer may not revoke acceptance against a manufacturer whom he did not buy from directly); *Gaha v. Taylor-Johnson Dodge, Inc.*, 632 P.2d 483, 486 (Or. Ct. App 1981) (re-affirmed *Clark* but holding that if an agency relationship between retailer and manufacturer can be established for the purposes of the sale then revocation by the buyer as against the remote manufacturer will lie).

¹⁶⁵ U.C.C. § 2-608(2) states that revocation is “not effective until the buyer notifies the seller of it.” (emphasis added). Additionally, U.C.C. § 2-608(1)(b) refers specifically to “the seller.” U.C.C. § 2-608 (1999).

¹⁶⁶ U.C.C. § 2-103(d) (1999).

¹⁶⁷ U.C.C. § 2-106(1) (1999).

breaching remote manufacturer does not “fit” the scenario envisioned by U.C.C. § 2-608.¹⁶⁸

A very recent case decided by in the District Court for the Northern District of Illinois, *Kutzler v. Thor Indus.*,¹⁶⁹ serves as a good representation of the majority view cases. United States Magistrate Judge Schenkier articulates each of the three primary arguments for the majority construction of U.C.C. § 2-608, finding revocation barred due to: (1) the plain language of § 2-608,¹⁷⁰ (2) lack of privity,¹⁷¹ and (3) a belief that revocation does not “fit” as a remedy in a tripartite rolling contract.¹⁷²

In this case a tripartite rolling contract was formed among the following parties: Mr. Kutzler, was the buyer of a \$400,000 motor home; Bernard Chevrolet was the direct seller (dealer); and Thor was the manufacturer and third-party warrantor.¹⁷³ When a number of defects became apparent soon after purchase,¹⁷⁴ Mr. Kutzler took the motor home to the authorized dealer for repair pursuant to his warranty agreement with the manufacturer.¹⁷⁵ After numerous attempts at repair, Mr. Kutzler notified Thor that he was revoking acceptance because the repeated failures by the dealer to cure the vehicle’s many defects.¹⁷⁶ When Thor

¹⁶⁸ See Flechtner, *supra* note 3, at 435.

[T]he remedies triggered by revocation do not, as a substantive and functional matter, “fit” the arrangement between a buyer and a third party warrantor because these remedies would require the warrantor to refund a purchase price it had not received in exchange for a product it did not sell to the revoking party.

Id. See also Monserud, *supra* note 5, 208 (“The critics have laid claim to a simple truth: That revocation of acceptance and rejection and refund were truly designed as remedies for immediate parties to a contract for sale and consequently do not fit easily when applied between remote parties.”).

¹⁶⁹ No. 03-C2389, 2003 U.S. Dist. LEXIS 11886, at *1 (N.D. Ill. July 11, 2003).

¹⁷⁰ See *id.* at *24

¹⁷¹ See *id.* at *17–*19, *25

¹⁷² See *id.* at *23–*24.

¹⁷³ See *id.* at *3–*4.

¹⁷⁴ Twenty-seven defects were listed in Mr. Kutzler’s complaint, including a faulty electrical system and wiring, problems with the plumbing, defective driving lights and brakes, defective steps, doors, and bumpers, and a defective engine and transmission. His complaint even throws in a defective kitchen sink. *Id.* at *5.

¹⁷⁵ Thor provided 24 month/24,000 mile, limited written warranty that expressly disclaimed coverage for certain items, such as the chassis, engine, and tires, which were covered by other warranties. *Kutzler v. Thor Indus., Inc.*, No. 03-C2389, 2003 U.S. Dist. LEXIS 11886, *3 (N.D. Ill. July 11, 2003). Only those defects covered by the warranty were considered as a basis for the revocation action. *Id.* at *20–*21.

¹⁷⁶ See *id.* at 5–6. Here Kutzler makes use of the “shaken faith doctrine.” See *supra* notes 153–55 and accompanying text.

refused, Kutzler sued for revocation of acceptance and breach of express and implied warranty.¹⁷⁷

Statutory language and concerns with privity influenced the Judge Schenkier's opinion to reject the revocation claim despite finding a breach of warranty.¹⁷⁸ He noted "[a]s a preliminary" matter that the cases allowing revocation "do not come to grips with the plain language of Section 2-608," rather, they merely concede that a buyer-seller relationship seems to be required.¹⁷⁹ These cases were also troubling to the judge because they disregard the requirement of privity, which the Illinois Supreme Court had recently reaffirmed as being relevant in implied warranty actions for economic loss.¹⁸⁰

Finally, U.S. Magistrate Judge Schenkier was persuaded that revocation was not the right "fit" as a remedy in this case. Judge Schenkier relied heavily on the Virginia Supreme Court decision in *Gasque v. Mooers Motor Car*¹⁸¹ to inform his understanding of the issues:

[W]hen applicable, the remedy of revocation "cancels a contract of sale, restores title to and possession of the goods to the seller, restores the purchase price to the buyer, and as fairly as possible, returns the contracting parties to the *status quo ante*." The Virginia Supreme Court reasoned that because the remote manufacturer is not involved in the sale transaction, it should have no involvement in the unwinding of that transaction that is the purpose of the remedy of revocation. Thus, the court held that "the remedy of revocation of acceptance under . . . [Section 2-608] is conceptually inapplicable to any persons other than the parties to the contract of sale sought to be rescinded."¹⁸²

Thus, Judge Schenkier followed the Virginia Supreme Court in finding that revocation under U.C.C. § 2-608 is not an available remedy for a buyer against a breaching remote manufacturer.¹⁸³

¹⁷⁷ See *id.* at *6, *20. Buyers may plead breach of warranty and revocation of acceptance as alternative theories. See *supra* note 129 and accompanying text.

¹⁷⁸ See *id.* at *20–*21.

¹⁷⁹ *Id.* at *24–*25 (citing *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1978)).

¹⁸⁰ See *id.* at *19–*20, *25 ("[T]he cases cited by the plaintiff all employ an interpretation of Section 2-608 that disregards the privity requirement, which recent Illinois Supreme Court precedent strongly indicates that Illinois is not prepared to do . . .").

¹⁸¹ 313 S.E.2d 384, 384 (Va. 1984).

¹⁸² *Kutzler v. Thor Indus., Inc.*, No. 03-C2389, 2003 U.S. Dist. LEXIS 11886, at *23 (N.D. Ill. July 11, 2003) (internal citations omitted).

¹⁸³ See *id.* at *25–*27.

3. *The Minority View: Revocation Allowed Against Remote Manufacturers*

A significant minority of jurisdictions have followed the opposite interpretation of U.C.C. § 2-608, allowing buyers to revoke acceptance against a remote manufacturer. Often, courts¹⁸⁴ and commentators¹⁸⁵ following in this construction of § 2-608 make a point of dispensing with the privity requirement as an outdated remnant of the common law. For example, in *Ventura v. Ford Motor Corp.*,¹⁸⁶ the court stated the following:

Only the privity concept, which is frequently viewed as a relic these days, has interfered with a rescission-type remedy against the manufacturer of goods not purchased directly from the manufacturer. If we focus on the fact that the warranty creates a direct contractual obligation to the buyer, the reason for allowing the same remedy that is available against a direct seller becomes clear.¹⁸⁷

Ventura makes the point that concerns for privity and the "fit" of the revocation remedy are misplaced where a manufacturer engages in inducing the

¹⁸⁴ As collected in Professor Gary L. Monserud, the following cases find revocation despite lack of privity between the buyer and remote manufacturer:

Ford Motor Credit Co., v. Harper, 671 F.2d 1117, 1126 (8th Cir. 1982) (applying Arkansas law); *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1978); *Volkswagen of Am., Inc., v. Novak*, 418 So. 2d 801, 804 (Miss. 1982); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1029 (Miss. 1982); *Ventura v. Ford Motor Corp.*, 433 A.2d 801, 811 (N.J. Super. Ct. App. Div. 1981); *Gochey v. Bombardier, Inc.*, 572 A.2d 921, 923 (Vt. 1990); see *Smith v. Navistar Int'l Transp. Corp.*, 714 F. Supp. 303, 309 (N.D. Ill. 1989); (applying the "close connection" doctrine of *Christianson v. Venturi Const. Co.*, 440 N.E. 2d 226, 228 (Ill. App. Ct. 1982) to allow buyer to bring action against financing company for seller's breach under financing instrument); *Erling v. Homera, Inc.*, 298 N.W.2d 478, 479 (N.D. 1980) (sustaining a judgment which allowed revocation of acceptance and held both the immediate seller and remote seller (manufacturer) liable for return of the purchase price).

Monserud, *supra* note 146, at 812 n.20 (1994). For a discussion of a number of these cases see, Monserud, *supra* note 163, at 365-73 (1994).

¹⁸⁵ See Flechtner, *supra* note 3, at 438.

Most of the commentators who argue that revocation should be available against third-party warrantors . . . adopt the position of some of the cases that permitting revocation against a third-party warrantor is merely a continuation of the process of removing outmoded privity barriers that interfere with the proper enforcement of rights.

Id.

¹⁸⁶ 433 A.2d 801 (N.J. Super. Ct. App. Div. 1981).

¹⁸⁷ *Id.* at 811-12;

buyer's purchase by marketing and passing along a warranty to the end purchaser. In *Ventura* and cases adopting its rationale,¹⁸⁸ the warranty creates a direct contract, the failure of the product to perform as advertised creates a breach, and assuming the other conditions of § 2-608 are met, revocation of acceptance is justified against the manufacturer.¹⁸⁹ Whether called a "direct contract" as does *Ventura*¹⁹⁰ or simply an "obligation" as does the new 2003 Amendment to § 2-313,¹⁹¹ *Ventura* remains a powerful argument for the principal that a sufficiently close relationship exists between manufacturer and consumer to allow revocation.

Ventura's implication of manufacturers' culpability due to their activities in inducing sale gathers strength from the well established principal that breaching third-party warrantors cannot hide behind "the citadel of privity" to avoid liability for warranty.¹⁹² The rationale for holding manufacturers' liable is eloquently stated by the New York Court of Appeals in *Randy Knitwear v. American Cyanamid*.¹⁹³

Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The

¹⁸⁸ See, e.g., *Gochey v. Bombardier*, 572 A.2d 921, 924 (Vt. 1990).

We agree with the rationale expressed in *Ventura* that when a manufacturer expressly warrants its goods, it, in effect, creates a direct contract with the ultimate buyer. . . . When the manufacture's defect results in revocation by the consumer, the manufacturer must assume the liability it incurred when it warranted the product to the ultimate user.

Id. (citations omitted).

¹⁸⁹ *Ventura*, 433 A.2d at 812.

¹⁹⁰ See *id.*

¹⁹¹ The 2003 Amendments to Article 2 indicate that the jurisprudential landscape is moving away from *Ventura*'s label of the parties relationship, direct warranty contract, in favor of the new label, "obligation." See *supra* notes 106-07 and accompanying text.

¹⁹² Nearly all jurisdictions now adopt the position that buyers may bring breach of warranty claims against a manufacturer not in privity of sales contract. See *Monserud*, *supra* note 184, at 393 (1994); *Flechtner*, *supra* note 3, at 439; but see *supra* note 152 and accompanying text.

¹⁹³ 181 N.E.2d 399, 399 (N.Y. 1962).

protection he really needs is against the manufacturer whose published representations caused him to make the purchase.¹⁹⁴

The comparison of manufacturer liability *on the contract* for breach of warranty in *Randy Knitwear*, with their liability *off the contract* under the revocation theory of *Ventura* is also useful in another line of attack on the majority construction of § 2-608.¹⁹⁵ Courts allowing revocation against a remote manufacturer have mitigated § 2-608's apparent textual limitations by pointing out that the warranty provisions of the code refer repeatedly to "the seller."¹⁹⁶ Therefore, since currently enacted sections 2-313¹⁹⁷ and 2-314,¹⁹⁸ dealing with express and implied warranties respectively, each use the term "seller," section 2-608's reference to "the seller" should benefit from the same liberal construction.¹⁹⁹ "In states where revocation of acceptance and refund are denied for lack of privity, and where damages for breach of warranty are allowed without privity, 'seller' has a double meaning."²⁰⁰

¹⁹⁴ *Id.*, at 402. The 2003 Amendments to Article 2 specifically adopt the principal of *Randy Knitwear* in the codification of new U.C.C. § 2-313B. See *supra* notes 186–87 and accompanying text.

¹⁹⁵ See Monserud, *supra*, note 163, at 391–98.

¹⁹⁶ See, e.g., *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1977) (en banc) (dismissing problems with § 2-608's reference to "the seller" by observing that absence of privity would not have barred plaintiff's suite *on the warranty* despite reference to the term "seller" in the warranty sections of Article 2).

¹⁹⁷ U.C.C. § 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by *the seller* are created as follows:

(a) Any affirmation of fact or promise made by *the seller* to the buyer . . .

(2) It is not necessary to the creation of an express warranty that *the seller* use formal words . . . but an affirmation merely of the value of the goods or a statement purporting to be merely *the seller's* opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313 (1999) (emphasis added).

¹⁹⁸ U.C.C. § 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) . . . [A] warranty that the goods shall be merchantable is implied in a contract for their sale if *the seller* is a merchant with respect to goods of that kind. . . .

U.C.C. § 2-314 (1999) (emphasis added).

¹⁹⁹ See, e.g., *Gochey v. Bombardier*, 572 A.2d 921, 923 (Vt. 1990) (citing *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1977) (en banc)).

²⁰⁰ Monserud, *supra* note 163, at 393.

C. Future Trends indicating Tripartite Revocation

1. 2003 Amendments to Article 2 Alleviate Textual, Privity Issues with Revocation

While the 2003 amendments do not explicitly adopt the minority interpretation of § 2-608, they arguably do more to support revocation against remote manufacturers than current Article 2. They do this in two ways. First, the amendments help to alleviate the textual problem created by § 2-608's repeated use of the term "seller." Second, the amendments explicitly reject lack of privity as a means of escape for manufacturers who induce consumer sales by engaging in advertising of the warranties they include in goods.

The 2003 Amendments to Article 2 contemplate that a manufacturer be labeled a "seller" for the purposes of enforcing a warranty obligation.²⁰¹ Section 2-608 is left substantively unchanged by the 2003 amendments, continuing to specify the conditions under which a buyer may revoke acceptance against a seller.²⁰² Therefore, reading the revised statute as a whole, § 2-608's use of the term "seller" need not present a bar to revocation against a manufacturer.²⁰³

Secondly, the drafters arguably helped the minority construction of § 2-608 by putting another nail in the coffin already inhabited by the doctrine of privity. By adopting the rule of *Randy Knitwear, Inc. v. American Cyanamid Co.*, the 2003 amendments make clear that breach of a promise or affirmation of fact related to the goods that are marketed and passed along to consumers by a manufacturer cannot be defended by lack of privity.²⁰⁴ Thus, recognition of the closeness of the manufacturer/consumer relationship, due to the manufacturer's inducement of sale, strengthens the minority contention that revocation of acceptance by a buyer against a manufacturer is a remedy that "fits."

²⁰¹ See *supra* notes 77–80 and accompanying text.

²⁰² See U.C.C. § 2-608 (amended 2003).

²⁰³ Had the drafters (or state legislatures following adoption) meant to limit revocation under U.C.C. § 2-608 to direct sellers they could have used the term "immediate buyer" in place of seller and "remote purchaser" in place of buyer as they did in § 2-313A and B. The 2003 Amendments demonstrate that the drafters know how to restrict a remedy to the direct seller only when they wish. Therefore, a reading of the statute as a whole gives some support to the idea that U.C.C. § 2-608 may be construed as allowing revocation actions against remote manufacturers, which the warranty sections define by implication as being a "seller."

²⁰⁴ See U.C.C. § 2-313B (amended 2003) and Proposed Comment 1; see *supra* notes 180–86 and accompanying text.

2. UCITA Allows Revocation of Acceptance for Computer Information Copies

As the prefatory comment to the UCITA explains, the code is meant to recognize the particularities of transactions involving computer information where the thing that is sold or licensed is often just a copy and not a tangible item in and of itself.²⁰⁵ In the case where a software copy has “material defects” UCITA § 707 provides for a form of revocation of acceptance based on U.C.C. § 2-608.²⁰⁶ Like revocation of acceptance for goods under U.C.C. § 2-608, under UCITA § 707 “[t]he revoking party is no longer liable for the price of the copy and, in appropriate circumstances, can obtain a refund.”²⁰⁷ However, unlike U.C.C. § 2-608, the concept of return is not relevant in UCITA § 707 “because it refers to rights on rejecting a contract, not refusing a copy tendered pursuant to a contract.”²⁰⁸ Nowhere in this section is a limitation on revocation created for direct buyer-seller transactions despite the fact that other sections specifically adopt rolling contracts for the sale of computer information.²⁰⁹ Thus, UCITA allows revocation of defective computer software copies against a remote manufacturer in a tripartite rolling contract.

V. TRIPARTITE ROLLING CONTRACTS SHOULD BE REVOCABLE AGAINST THEIR OFFEROR

As discussed in the preceding sections, tripartite rolling contracts are formed in the manner prescribed by *ProCD*. Whether or not they may be revoked after formation is the subject of debate in the split of authority construing U.C.C. § 2-608. I suggest in this section simply that what is good for the goose is good for the gander. That is, the principles that underlie formation of a tripartite rolling contract should be equally applicable to their revocation.

A. Close Enough To Form Means Close Enough To Revoke

Randy Knitwear v. American Cyanamid,²¹⁰ signaled long ago that the “citadel of privity” has fallen for the purpose of enforcing warranties. Building on this premise, the *Ventura* case makes the point that manufacturers and end purchasers are not such distant parties that revocation would be an inappropriate

²⁰⁵ See UCITA prefatory note (2001).

²⁰⁶ See UCITA § 707 cmts.1, 2 (amended 2002).

²⁰⁷ UCITA § 707 cmt.1 (amended 2002).

²⁰⁸ *Id.*

²⁰⁹ See *supra* notes 125–28 and accompanying text.

²¹⁰ See *supra* notes 194–95 and accompanying text.

remedy.²¹¹ The 2003 Amendments to Article 2 adopt the general principal of manufacturer obligation in a tripartite rolling contract while also alleviating the textual limitation some majority-view courts have fixated on in denying revocation.²¹²

ProCD further illustrates the closeness of the buyer/remote manufacturer relationship through its defense of the rights of manufacturers to enforce the terms of shrinkwrap agreements in tripartite rolling contracts. Central to Judge Easterbrook's reasoning in *ProCD* is his contention that the buyer and remote manufacturer are intimately connected through an offer and acceptance process.²¹³ Easterbrook points to U.C.C. §§ 2-602 and 2-606, defining acceptance and rejection of goods, to reinforce his argument:

A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1). *ProCD* extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2-606 only to show that the opportunity to return goods can be important . . . the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.²¹⁴

Ironically, both of the U.C.C. sections cited by Judge Easterbrook to support his point are victims of the same outmoded phraseology that creates the split of authority in construing U.C.C. § 2-608. Both §§ 2-602 and 2-606 repeatedly refer to "the seller."²¹⁵ Therefore, if these sections are to be interpreted consistently, whatever meaning is imputed to the term "seller" for purposes of formation of the

²¹¹ See *supra* notes 187-93 and accompanying text.

²¹² See *supra* Part IV.C.1.

²¹³ *ProCD*, 86 F.3d at 1447, 1452.

²¹⁴ *Id.* at 1452-53.

²¹⁵ U.C.C. § 2-602 states:

(1) Rejection of goods . . . is ineffective unless the buyer seasonably notifies *the seller*. (2) . . . (a) after rejection any exercise of ownership by the buyer . . . is wrongful as against *the seller*; and (b) if the buyer has before rejection taken physical possession of goods . . . he is under a duty after rejection to hold them with reasonable care at *the seller's* disposition for a time sufficient to permit *the seller* to remove them . . . (3) *The seller's* rights with respect to goods wrongfully rejected are governed by the provisions of this Article on *Seller's* remedies in general (Section 2-703).

U.C.C. § 2-602 (1999) (emphasis added). Similarly, U.C.C. § 2-606 states, "(1) Acceptance of goods occurs when the buyer (a) . . . signifies to *the seller* that the goods are conforming or . . . (c) does any act inconsistent with *the seller's* ownership . . ." U.C.C. § 2-606 (1999) (emphasis added).

tripartite rolling contract under *ProCD* should be employed for defining the scope of the same term “seller” in U.C.C. § 2-608.

On the facts of *ProCD*, this modern form of contracting, via shrinkwrap agreement, took place not between a direct seller and buyer but via the manufacturer and the buyer. Thus, Easterbrook’s examples of the modern usage of trade apply directly to tripartite rolling contracts. Just because the direct connection between manufacturer and end purchaser does not fit the classic direct seller/buyer model does not somehow mean that buyers should lose their rights to a refund on breach. Stated simply, revocation “fits” as a remedy between manufacturer and end purchaser at least as well as shrink wrap agreements “fit” as a mode of forming the tripartite rolling contract to begin with.

Professor Harry M. Flechtner points out the buyer’s payment to the retailer did not directly benefit the manufacturer and that requiring a full refund be paid by the manufacturer would unjustly enrich the retailer.²¹⁶ What this argument boils to down as a practical matter is the difference between the wholesale cost and the retail cost of the consumer good.²¹⁷

A buyer should not be prevented from being made whole for the sole practical reason of keeping a breaching manufacturer from eating the retailers’ marginal profit when goods are defective and cannot be fixed. First, the manufacturer engages in the practice of issuing the warranty because of the very real benefit it receives in increased sales to retailers. Whether direct or indirect, the money is just as green. Secondly, manufacturers need only worry about revocation where its goods are defective and where the warranty service fails to correct the defect—otherwise the warranty itself would resolve the issue. Arguably, a scrupulous company would want to offer a customer a refund anyway in such situations if only to protect its good name. Thirdly, should manufacturers decide that it is disadvantageous to stand behind their products they can always avoid making warranties to begin with. Such an approach would more honestly communicate to consumers the true value of the goods they purchase.

B. Revocation of Tripartite Rolling Contracts Is Sound Policy

It makes good economic sense for manufacturers to bear the extra cost of the marginal price when their goods are nonconforming and their warranties fail of their essential purpose. First, the manufacturer is the party responsible for the breach and should be encouraged to reduce defects. Being forced to refund the retail price for goods that are defective and cannot be remedied under the terms of the warranty creates an incentive to reduce such defects in future goods. Furthermore, manufacturers are encouraged to draft their warranty agreements

²¹⁶ See Flechtner, *supra* note 3, at 445–47.

²¹⁷ See Monserud, *supra* note 5, at 208.

and structure their means of servicing defective products in a manner that actually solves the consumer's problem rather than imposing the hardship that would lead a consumer to seek a revocation. Also, where manufacturers are very large, and many are, they will likely be the most efficient cost avoider not only because they have control over the quality of the goods but also because they benefit from economies of scale. For example, Tyco can negotiate more favorable rates for insurance and for borrowing money than can the mom-and-pop toy store where some of their goods are sold to the consumer. Finally, if manufacturers are concerned that some sellers will greatly inflate the retail price above the wholesale price, thereby increasing the manufacturer's exposure in case of revocation, the manufacturer is given an incentive to negotiate with retailers for lower retail sales prices.

VI. CONCLUSION

Like it or not, it appears that rolling contracts have become an integral part of the modern day usage of trade in consumer goods. U.C.C. § 2-608, an important remedy to consumers, given the ease by which acceptance can occur in a rolling contract transaction, can and should be allowed in the tripartite scenario. First, the doctrinal underpinnings of tripartite transactions should be applied as equally in contract formation as they are in fashioning remedies for breach. Therefore, if tripartite rolling contracts create a sufficiently close relationship for manufacturers to bind consumers with warranty disclaimers, terms of use, and restrictions on remedies, then it follows that this relationship is sufficiently close for consumers to use U.C.C. § 2-608 to roll-back the rolling agreement, where justified, as they could against a direct seller in a bipartite rolling contract. This is especially true where the manufacturer is heavily involved in inducing the sale through advertisement of the product itself and of the enclosed manufacturer's warranty. By voluntarily engaging in a practice that binds an end-consumer to contract terms, often without the consumer's full knowledge or appreciation, remote manufacturers are not well positioned to complain when such agreements are revoked due to manufacturer's breach and subsequent failure to cure.